4324.

SUPREME COURT OF THE UNITED STATES.

No. 134.

THOMAS J. GREEN, PLAINTIFF IN ERROR,

vs.

WILLIAM CUSTARD.

IN WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

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THE UNITED STATES OF AMERICA.

District Court of the United States for the western district of Texas, at Austin holding session.

At a term of the district court of the United States, in and for the western district of Texas, begun and held at the city of Austin, on the first Monday of June, A. D. 1858—present the Hon. Thomas H. Duval, judge of said court, Wm. C. Young, U. S. marshal, and Matthew Hopkins, clerk—among other were the following proceedings, to wit:

Title of Cause.

WILLIAM CUSTARD, Plaintiff,
vs.
THOMAS J. GREEN, Defendant. } No. 171.

Be it remembered, that heretofore, to wit, on the second day of October, A. D. 1856, there was filed, as it appears by the record in the district court of the United States, for the then district of Texas, at Austin, the Honorable John C. Watrous being judge, and William P. De Normandie clerk, the transcript of the proceedings with the accompanying papers, in the case of William Custard versus Thomas J. Green, transferred by order of the district court of McLennan county, State of Texas, to the United States district court, for the district of Texas, at Austin holding session, which transcripts and papers are endorsed, filed October 2d, 1856, and—

(Signed) W. P. DE NORMANDIE, *Clerk*.

The transcript of the orders had in the State court of McLennan county is in words to wit:

Transcript of Orders in State Court.

THE STATE OF TEXAS,
County of McLennan.

WILLIAM CUSTARD
versus
THOMAS J. GREEN.

At a term of the district court, begun and holden at the courthouse, in the town of Waco, within and for the county of McLennan, and State of Texas, on Wednesday, the 16th day of May, A. D. 1855, it being the third day of said term, before the Hon. R. E. B. Baylor, judge thereof, among other proceedings had in said term was the following in words and figures, viz:

WILLIAM CUSTARD
vs.
THOMAS J. GREEN. } No. 207.

"In this case it is ordered by the court that the plaintiff have leave to file an amended petition."

It is further ordered by the court, that the alias writs of attachments and citations be returnable to the next term of this court, as prayed for in plaintiff's petition.

And afterwards, to wit, at the fall term of said court, A. D. 1855, to wit, on Saturday of said term, was had among other proceedings:

WILLIAM CUSTARD
vs.
THOMAS J. GREEN. } No. 207.

"This cause stands continued by operation of law."

Afterwards, to wit, at the spring term of said court, A. D. 1856, among other proceedings had was the following:

WILLIAM CUSTARD
vs.
THOMAS J. GREEN. } No. 207.

On motion of the defendant, it appearing to the satisfaction of the court that the said defendant, Thomas J. Green, is a non-resident of the State of Texas, and the matters in controversy is above the sum of five hundred dollars, and having given bond in the sum of five hundred dollars, it is ordered that the cause be transferred to the federal court of the United States, holding session at the city of Austin, in the State of Texas, at their next term thereof.

THE STATE OF TEXAS,
County of McLennan.

I, John R. Harris, clerk of the district court within and for the county of McLennan, and State aforesaid, do hereby certify that the annexed and foregoing is a true and correct transcript of all the proceedings had in the case No. 207, wherein William Custard is plaintiff, and Thomas J. Green is defendant, as fully and accurately as the same remains and at large appears on the record of the district court on file in my office, together with the original papers which accompany this transcript.

In testimony whereof, I hereto set my hand and affix the impress of the seal of said court, at office in Waco, this [SEAL.] 25th day of September, A. D. 1856.

JOHN R. HARRIS,
Clerk D. C. McL. Co., Texas.

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In District Court, McLennan county.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN. } No. 207.

Bill of Costs taxed in the above entitled cause, as appears from the fee book on file in my office.

Clerk's fees—Jno. R. Harris:

To filing 8 papers, at 10 c	80	
1 citation to *printer*	75	
3 writs of attachment	1 50	
bond	1 00	
1 alias citation to *printer*	75	
3 writs of summons	1 50	
2 orders of continuance	1 30	
docketing cause	15	
taxing cost	25	
2 appearances	20	
1 affidavit	25	
1 order	50	
transcript	1 50	
postage	50	
		10 95
Sheriff's—Thomas Hogan, Harris county:		
To levying and returning writ of attachment		2 00
Sheriff's and marshal's fees—Bosque county:		
To *printer's* fees—pd. pl'ff att'y		45 00
suing and levying attachment		2 00
		$59 95

Attest:

JNO. B. HARRIS,
Cl'k D. C. McL. C.

THE STATE OF TEXAS,
County of McLennan.

I, John R. Harris, clerk of the district court in and for the county and State aforesaid, do hereby certify that the within and forgoing list of fees taxed in the cause of Custard vs. Green is a true and correct taxation of costs as assessed in said cause.

Witness my hand and the impress of the seal of said court, af-
[SEAL.] fixed at office in Waco, this 25 day of September, A. D. 1856.

JNO. R. HARRIS,
Cl'k D. C. McL. Co.

Accompanying the aforesaid transcript from McLennan county, the following papers were filed as appears upon them endorsed, to wit:

Filed October 2d, 1856.

W. P. DE NORMANDIE, *Clerk.*

The first of which, in the order of their dates of filing in the district court of McLennan county, is in words, to wit—endorsed, to wit:

Filed 9th day of April, A. D. 1855.

JNO. R. HARRIS.
D. C. McL. C.

Petition—State Court.

In District Court, McLennan county—Spring Term, 1855.

THE STATE OF TEXAS,
County of McLennan, ss.

To the Honorable R. E. B. Baylor, Judge of the third judicial district for the State of Texas:

The petition of William Custard, a resident citizen of the county of Travis, and State of Texas, would respectfully represent, that he is the legal owner by assignment in writing for a valuable consideration of a judgment rendered in the county of Sutter, in the State of California, by the district court for said county, on the 13 day of October, 1853, in favor of Francis Arthur against Thomas J. Green, for the sum of five thousand dollars, together with interest thereon at the rate of 3 per cent. per month from the 9th day of December, A. D. 1851, until paid, and the further sum of two hundred and eighty dollars costs of suit; a properly authenticated transcript of which said judgment, and the proceedings in said cause, is hereinafter filed, and will be exhibited and read upon the trial of this cause.

Petitioner further states, that, with the exception of one thousand dollars, raised by sale of property on execution issued upon said judgment on the 15th day of December, 1853, the said judgment remains unpaid, and is now due and owing to your petitioner, as assignee as aforesaid; wherefore petitioner says, that the said Thomas J. Green is justly indebted to him in the aforesaid sum of five thousand dollars, with interest thereon from the 9th day of December, 1851, at the rate of three per cent. per month, besides the further sum of three hundred and eighty dollars costs of suit; and that said amounts of principal, interest and costs up to the 9th day of March, 1855, after deducting the aforesaid one thousand dollars paid on execution, to the sum of eleven thousand nine hundred and thirty-eight dollars.

Petitioner further states, that the said Thomas J. Green is not a resident citizen of this State, but is, as petitioner is advised, a resident citizen of the State of Massachusetts.

Petitioner further states, that he is informed and believes that he has property situate within the jurisdiction of your honor's court for said county of McLennan, and also the counties of Harris and Bosque. Wherefore your petitioner prays for the writ of attachment directed the sheriff of McLennan county; also for branch writs of attachment to counties of Harris and Bosque, properly directed, and for service by publication upon the said Thomas J. Green, requiring him to be and appear at the next term of your honor's court, to be holden for said county of McLennan, to answer this petition; and petitioner prays for judgment for the aforesaid sum of five thousand dollars, with interest thereon at the rate of three per cent. per month from the 9th day of December, 1851, up to judgment herein, together with the further sum of two hundred and eighty dollars costs of original suit. less the sum of one thousand dollars. He prays also for costs of suit, &c.

HAMILTON & CHANDLER,
Attorneys for Plaintiff.

THE STATE OF TEXAS,
County of McLennan.

This day personally came and appeared before me, J. R. Harris, clerk of the district court, F. W. Chandler, attorney for the plaintiff in the foregoing petition, who makes oath the facts set forth in said petition are true as therein set forth.

F. W. CHANDLER.

Sworn to and subscribed before me this 15th day of May, 1855.

J. R. HARRIS,
D. C. McL. Co., Texas.

Transcript of the Record, California.

And on the same day, as appears by the filing of the clerk of the district court of McLennan county, endorsed "Filed April 9th, 1855.

JNO. R. HARRIS,
D. C. McL. C."

The plaintiffs filed the transcript of the record and proceedings had in the district court (10th judicial district) in the State of California, in the case of Francis Arthur vs. Thomas J. Green, which is in words, to wit:

STATE OF CALIFORNIA,
County of Sutter.

In the district court of the tenth judicial district, within and for said county, at a term thereof begun and holden at the court-

Accompanying the aforesaid transcript from McLennan county, the following papers were filed as appears upon them endorsed, to wit:

Filed October 2d, 1856.

W. P. DE NORMANDIE, *Clerk.*

The first of which, in the order of their dates of filing in the district court of McLennan county, is in words, to wit—endorsed, to wit:

Filed 9th day of April, A. D. 1855.

JNO. R. HARRIS.
D. C. McL. C.

Petition—State Court.

In District Court, McLennan county—Spring Term, 1855.

THE STATE OF TEXAS,
County of McLennan, ss.

To the Honorable R. E. B. Baylor, Judge of the third judicial district for the State of Texas:

The petition of William Custard, a resident citizen of the county of Travis, and State of Texas, would respectfully represent, that he is the legal owner by assignment in writing for a valuable consideration of a judgment rendered in the county of Sutter, in the State of California, by the district court for said county, on the 13 day of October, 1853, in favor of Francis Arthur against Thomas J. Green, for the sum of five thousand dollars, together with interest thereon at the rate of 3 per cent. per month from the 9th day of December, A. D. 1851, until paid, and the further sum of two hundred and eighty dollars costs of suit; a properly authenticated transcript of which said judgment, and the proceedings in said cause, is hereinafter filed, and will be exhibited and read upon the trial of this cause.

Petitioner further states, that, with the exception of one thousand dollars, raised by sale of property on execution issued upon said judgment on the 15th day of December, 1853, the said judgment remains unpaid, and is now due and owing to your petitioner, as assignee as aforesaid; wherefore petitioner says, that the said Thomas J. Green is justly indebted to him in the aforesaid sum of five thousand dollars, with interest thereon from the 9th day of December, 1851, at the rate of three per cent. per month, besides the further sum of three hundred and eighty dollars costs of suit; and that said amounts of principal, interest and costs up to the 9th day of March, 1855, after deducting the aforesaid one thousand dollars paid on execution, to the sum of eleven thousand nine hundred and thirty-eight dollars.

Petitioner further states, that the said Thomas J. Green is not a resident citizen of this State, but is, as petitioner is advised, a resident citizen of the State of Massachusetts.

Petitioner further states, that he is informed and believes that he has property situate within the jurisdiction of your honor's court for said county of McLennan, and also the counties of Harris and Bosque. Wherefore your petitioner prays for the writ of attachment directed the sheriff of McLennan county; also for branch writs of attachment to counties of Harris and Bosque, properly directed, and for service by publication upon the said Thomas J. Green, requiring him to be and appear at the next term of your honor's court, to be holden for said county of McLennan, to answer this petition; and petitioner prays for judgment for the aforesaid sum of five thousand dollars, with interest thereon at the rate of three per cent. per month from the 9th day of December, 1851, up to judgment herein, together with the further sum of two hundred and eighty dollars costs of original suit. less the sum of one thousand dollars. He prays also for costs of suit, &c.

HAMILTON & CHANDLER,
Attorneys for Plaintiff.

THE STATE OF TEXAS,
County of McLennan.

This day personally came and appeared before me, J. R. Harris, clerk of the district court, F. W. Chandler, attorney for the plaintiff in the foregoing petition, who makes oath the facts set forth in said petition are true as therein set forth.

F. W. CHANDLER.

Sworn to and subscribed before me this 15th day of May, 1855.

J. R. HARRIS,
D. C. McL. Co., Texas.

Transcript of the Record, California.

And on the same day, as appears by the filing of the clerk of the district court of McLennan county, endorsed "Filed April 9th, 1855.

JNO. R. HARRIS,
D. C. McL. C."

The plaintiffs filed the transcript of the record and proceedings had in the district court (10th judicial district) in the State of California, in the case of Francis Arthur vs. Thomas J. Green, which is in words, to wit:

STATE OF CALIFORNIA,
County of Sutter.

In the district court of the tenth judicial district, within and for said county, at a term thereof begun and holden at the court-

house, in Nicolaus, in said county on Monday, the tenth day of October, one thousand eight hundred and fifty-three.

Present, the Honorable M. T. Barbour, judge.

FRANCIS ARTHUR, Plaintiff,
vs.
THOMAS J. GREEN, Defendant.

Be it remembered, that heretofore, to wit, on the 26th day of May, in the year of our Lord one thousand eight hundred and fifty-three, the said plaintiff, by his attorney, filed in said court in the clerk's office thereof his complaint in words and figures—that is to say:

FRANCIS ARTHUR
vs.
THOMAS J. GREEN.

STATE OF CALIFORNIA,
County of Sutter.

In the District Court for Sutter county.

Francis Arthur, the plaintiff in this suit, represents to this honorable court, that Thomas J. Green, the defendant herein, on the ninth day of December, 1851, made, executed and delivered to plaintiff his certain writing obligatory, in words and figures as follows, to wit:

$5,000. SAN FRANCISCO, *9th December*, 1851.

Nine months after date, I promise to pay Francis Arthur, or order, five thousand dollars, with interest at the rate of three per cent. per month, from date till paid, for value received.

Witness my hand and seal.

(Signed) THO'S J. GREEN. [SEAL.]

Plaintiff further represents, that the said defendant, Thos. J. Green, on the said 9th day of December, 1851, made, executed and delivered to plaintiff his certain deed of mortgage on the following tract of land situated and lying in the county of Sutter, in the State of California, to wit:

Beginning at a point on the south side of Bear creek, a tributary of Feather river, one and one half miles above the upper boundary of Nicolaus Altger's rancho, and running easterly along the upper boundary of John A. Sutter's reservation of land, between the land hereby conveyed and the said Altger's rancho, one mile; thence northwardly on a straight line running parallel as nearly as may be with the course of said Bear creek, and continuing one mile distant therefrom, the distance of (2) miles; thence in a straight line running parallel with the first mentioned boundary of these premises to the south*ron* bank of Bear creek aforesaid; thence along

the southron bank of the said creek to the place of beginning; it being the same land which was sold and conveyed by John A. Sutter, in Upper California, to the said Thomas J. Green, by deed dated the 11th December, 1849, duly recorded in the recorder's office of Sutter county, reserving and excepting one thirty-second part of said tract of land heretofore set apart and conveyed by the said Thos. J. Green to John Barham for the boundaries of the same, will freely appear; together with all and singular the edifices, buildings, hereditaments and appurtenances to the same belonging or in anywise appertaining: to have and to hold said tract of land and premises unto him, the said Francis Arthur, his heirs and assigns forever; conditioned, however, that if said defendant, Thos. J. Green, his heirs, executors, administrators and assigns, should faithfully pay to the said plaintiff, Francis Arthur, his heirs, executors, administrators or assigns, the said note of five thousand dollars, $5,000, according to the tenor and true intent and meaning thereof of said promissory note, then the said deed of mortgage was to be null and void, and of no effect whatever. But if the said Thos. J. Green should fail or neglect to pay the said note, according to its tenor, intent and meaning, then and in that event the said deed was to remain and be of full force and effect; all of which will more fully appear by the said mortgage deed hereto attached marked (A) and asked to be made a part of this bill of complaint.

Plaintiff avers that the whole of said note, to wit, the sum of five thousand dollars, together with interest thereon, at the rate of three per cent. per month, from the 9th day of December, 1851, remains due and unpaid to him, and that the said defendant hath wholly neglected and refused, and doth still neglect and refuse to pay the same, although often requested so to do. Plaintiff also avers that by reason of the failure of said def't to pay to the plaintiff the said promissory note, according to its tenor, intent and meaning, that the premises and land in said mortgage deed mentioned and described has become and is forfeited. In consideration, therefore, of the greivances, the plaintiff brings his suit and asks of the court a judgment against the said Thomas J. Green for said sum of $5,000, together with three per cent. per month, with interest from the 9th day of December, 1851, and also for judgment of this court, that the equity of redemption and all other rights, title and interest of the said defendant in and to said real estate and premises in the said deed mentioned be forever foreclosed and barred, and that the same be sold, and the proceeds thereof be applied towards the payment of said $5,000 and interest, and the costs of this suit, or so much thereof as may be sufficient to pay the same, and that the residue, if any there should be, should be paid unto this hon. court to be disposed of according to law and equity.

LONG & FRY, *Att'ys for Plaintiff.*

This indenture, made this 9th day of December, in the year of our Lord one thousand eight hundred and fifty-one, between Thomas J. Green, of the State of California, of the first part, and Francis Arthur, of the same State, of the second part, witnesseth: That the said party of the first part, as well for the better securing to the party of the second part the faithful payment of the debt which the said Thos. J. Green, party of the first part, owes to the said Francis Arthur, party of the second part, in manner hereinafter mentioned, as in consideration of the sum of one dollar, to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, aliened, released, and confirmed, and by these presents do grant, bargain, sell, alien, release, and confirm unto the said party of the second part, and to his heirs and assigns forever, the following described tract of land, situate, lying, and being in the county of Sutter, State of California, bounded and described as follows, viz: beginning at a point on the south side of Bear creak, (a tributary of Feather river,) one and one-half miles above the upper boundary of Nicholaus Altger's rancho, and running eastwardly along the upper boundary of John A. Sutter's reservation of land, between the said Altger's and the land hereby conveyed, one mile; thence northwardly in a straight line, parallel as may be with the course of Bear creek, and continuing one mile distant therefrom the distance of (2) miles; thence in a straight line, running parallel with the first mentioned boundary of these premises, to the south*ron* bank of Bear creek aforesaid; thence along the said south*ron* bank of said creek the place of beginning—it being the same land which was sold and conveyed by John A. Sutter, of Hock, in Upper California, to the said Thomas J. Green, by deed dated 11th December, 1849, duly recorded in the recorder's office of Sutter county, reserving and excepting one thirty-second part of said tract of land, heretofore set apart and conveyed by the said Thomas J. Green to John Burham, reference to said Green's deed to said Burham for the boundaries of the same will fully appear—together with all and singular the edifices, buildings, hereditaments, and appurtenances to the same belonging, or in any wise appertaining; to have and to hold the said land and premises hereby granted and released, with the hereditaments and appurtenances thereunto belonging, unto the said Francis Arthur, party of the second part, his heirs and assigns forever.

Upon condition, nevertheless, that if the said Thomas J. Green, party of the first part, his heirs, executors, administrators, or assigns, shall faithfully pay to the said Francis Arthur, party of the second part, his executors and administrators, or assigns, according to the tenor and true intent and meaning of a certain promissory note, dated the 9th day of December, 1851, and duly made and executed, and made payable by the said Thomas J. Green, of

the first part, to the party of the second part, or order, nine months after date, for the sum of five thousand dollars, bearing interest at the rate of three per cent. per annum from the date thereof until paid; then this present indenture, and the estate hereby granted, and every article and clause herein contained, shall be null and void, and of no effect whatever, otherwise to remain in full force and effect.

And it is hereby further understood by and between the parties of the first part and second part, that the said Francis Arthur, party of the second part, shall have the right and privilege at any time within three months from now, the date hereof, to take the land hereby mortgaged to secure said five thousand dollars and interest by the payment of the additional sum of five thousand dollars, to be paid as hereinafter agreed on by said parties.

In testimony whereof, the said Thomas J. Green hath hereunto set his hand and affixed his seal the day and year first above written.

THOMAS J. GREEN. [SEAL.]

Signed, sealed, and delivered in presence of—
JNO. C. MCLENON.

STATE OF CALIFORNIA,
County of San Francisco.

On this day of December, in the year A. D. 1851, before me, the undersigned notary public, in and for the county and State aforesaid, dwelling in the city of San Francisco, personally appeared the within named Thos. J. Green, to me known to be the person described in and who executed the within indenture of mortgage, and who acknowledged before me that he had executed the same for the use and purpose therein mentioned.

In witness whereof I have hereunto set my hand and seal of office at the city of San Francisco.

[L. S.] "A." JOHN K. HACKETT,
Notary Public.

And afterwards, to wit, on the said 21st day of May, A. D. 1853, the said plaintiff, by his attorney, filed in said court, in the clerk's office thereof, his affidavits, in the words and figures following, that is to say:

In the District Court for Sutter county.

FRANCIS ARTHUR, Pl'ff,
vs.
THOMAS J. GREEN, Def't.

STATE OF CALIFORNIA,
County of Sacramento, ss.

William S. Long, being first duly sworn, on oath says, that on

the 6th day of May last the said Thomas J. Green left the State of California for the city of Boston, in the State of Massachusetts; that on or about the 2d day of June last affiant saw the said Thomas J. Green in the city of New Nork, in the State of New York. Affiant further says, that to the best of his knowledge, information, and belief, the said Thomas J. Green has not since that time returned to this State, but is now, as affiant believes, and has reason to believe, in the Empire of France. Affiant further says, that a cause of action exists against the said Thos. J. Green in the above entitled action, and this affidavit is made out by him, one of the attorneys of the said Francis Arthur, because said Arthur last heard from by affiant was in the county of El Dorado, and could not without great expense and inconvenience make the same. Affiant therefore asks that the court may grant an order that service be made upon said Thomas J. Green in the said action by publication of the manner and form provided by law.

W. *C.* LONG. [SEAL.]

Sworn to and subscribed before me this 10th day of March, 1853.

L. B. HARRIS, *Clerk.*

And afterwards, to wit, on the 26th day of May, 1853, an order was filed in the clerk's office thereof in words and figures following, that is to say:

In the District Court of the 10th Judicial District in and for Sutter county, Cal'a.

FRANCIS ARTHUR
vs.
THOMAS J. GREEN.

It appearing to me upon the affidavit of W. S. Long, attorney for plaintiff in the above entitled cause, that the defendant herein has departed from and is a non-resident of this State, and that a cause of action exists against the said defendant, and that the said defendant is a proper party to this action. It is therefore ordered that service of summons in this case be made by publishing the same once a week, for the period of three months, in the "Democratic State Journal," a newspaper published in the city of Sacramento, in this State.

Done at Nicolaus this 26th day of May, A. D. 1858.

R. B. SHEWARD,
County Judge, Sutter County.

STATE OF CALIFORNIA,
County of Sutter, ss.

District Court of the 10th Judicial District.

The people of the State of California to Thomas J. Green, greeting:

You are hereby commanded to answer the complaint of Francis

Arthur in said court filed against you, within ten days after service of this writ, exclusive of the day of service, if served on you in this county, but if served on you without the said county, then in forty days from such service, exclusive of the day of service, in an action commenced on the 26th day of May, 1853, in said court, wherein the plaintiff prays judgment against said defendant for the sum of $5,000, together with interest at three per cent. per month, from the 9th day of December, 1851, upon a promissory note executed by said defendant to said plaintiff on the day aforesaid, and also for the foreclosure of a certain mortgage, executed by the said defendant to secure the payment of said note. If you fail to answer said complaint as directed, the plaintiff will take judgment against you for the aforesaid sum, interest, and costs by default, and will apply to the court for such other relief as in said court demanded.

Given under my hand and the seal of the district court aforesaid, this 26th day of May, A. D. 1853, at office in Nicolaus.

[L. S.]

JOHN S. REARDON,
Clerk of the District Court
in and for the County of Sutter.

LONG & FRY,
Att'ys for Pl'ff.

And afterwards, to wit, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and fifty-three, orders are entered in said cause upon the record of said court in the words and figures following, to wit:

FRANCIS ARTHUR
vs.
THOMAS J. GREEN.

Now on this day comes this cause for trial, and the defendant having failed to answer, and being solemnly called, comes not; and the plaintiff having produced his evidence herein, and the court having found the facts herein in the plaintiff's petition contained, according to the advertisement of his complaint, it is thereupon considered and adjudged, that the plaintiff recover of and from the defendant the sum of five thousand dollars, together with interest thereon, at the rate of three per cent. per month, from the ninth day of December, A. D. 1851, until paid, and also for the sum of two hundred and eighty dollars, costs allowed in this case. And it is further ordered, adjudged, and considered and decreed, that the following described property, to wit: beginning at a point on the south side of Bear creek, a tributary of Feather river, one and one half miles above the upper boundary of Nicolaus Altger's ranch, and running eastwardly along the upper boundary of John

A. Sutter's reservation of land, between the said Altger's ranch, and the land hereby conveyed, one mile; thence northwardly in a straight line parallel as near as may be with the course of said Bear creek, and continuing one mile distant therefrom, the distance of two (2) miles; thence in a straight line running parallel with the first mentioned boundary of these premises, to the southern bank of Bear creek aforesaid; thence along the southern bank of the said creek to the place of beginning—it being the same land which was sold and conveyed by John A. Sutter, of Hock, in Upper California, to the said Thomas J. Green, by deed, dated the eleventh day of December, 1849, duly recorded in the recorder's office of Sutter county, reserving and excepting one thirty-second part of said tract of land, before the said 9th day of December, 1851, conveyed by the said Thomas J. Green to John Barham, as by reference to the deed of the said Green to the said Barham will fully appear; which said property was by the defendant mortgaged to the plaintiff on the said 9th day of December, 1851, to be sold by the sheriff of said county, to satisfy the debt and interest aforesaid, and that upon such sale the equity of redemption of defendant in and to the said property be forever foreclosed; and that if the proceeds of such sale shall be insufficient to satisfy the said debt, interest, and costs, then the plaintiff shall have execution for the residue thereof; and should there remain a surplus, after satisfying the debt, interest, and costs of this suit, then that to be paid to the defendant, mortgagor.

(Signed) M. T. BARBOUR,
Dist. Judge.

And afterwards, to wit, on the 15th day of December, A. D. 1853, the sheriff of said county of Sutter returned into court an execution issued in the said cause, which, with the return of the sheriff thereon endorsed, is in words and figures following, that is to say:

District Court, 10th Judicial District.

STATE OF CALIFORNIA,
County of Sutter.

The people of the State *of the State* of California to the Sheriff of Sutter county, greeting:

Whereas judgment was rendered in this court on the 13th day of October, A. D. 1853, against Thomas J. Green, and in favor of Francis Arthur, for the sum of five thousand dollars, with interest at the rate of three per cent. per month, from Dec. 9th, 1851, to Oct. 9, 1853, which total amount of interest up to the said 9 Octo., 1853, is three thousand three hundred dollars, making the amount up to the rendition of this judgment eight thousand three hundred dollars, ($8,300,) with three per cent. from rendition of judgment

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until paid, and two hundred and eighty dollars costs *costs* of this suit.

And whereas it was further ordered and decreed by the said court that the following described property, to wit, beginning at a point on the south side of Bear creek, a tributary of Feather river, one and one-half miles above the upper boundary of Nicolaus Altger's ranch, and running easterly by and along the upper boundary of John A. Sutter's reservation of land between the said Altger's ranch and the land hereby conveyed, one mile; thence northwardly in a straight line, parallel as near as may be with the course of said Bear creek, and continuing one mile distant threfrom the distance of two miles, in a straight line running parallel with the first mentioned boundary of these premises to the southern bank of Bear creek aforesaid; thence along the said southern bank of the said Bear creek to the place of beginning; it being the same land which was sold and conveyed by John A. Sutter, of Hock, in Upper California, to the said Thomas J. Green, by deed dated the 11th day of December, A. D. 1848, duly recorded in the recorder's office of Sutter county, reserving and excepting one thirty-second part of said tract of land before the said 9th day of Dec., 1851, conveyed by the said Thomas J. Green to John Barham, as by reference to the deed of the said Green to the said Barham will fully appear, which said property was by the defendant mortgaged to the plaintiff to secure the payment of said debt and interest aforesaid to the plaintiff on the 9th day of Dec., 1851, to be sold by the sheriff of said county to satisfy the debt and interest aforesaid; and that upon such sale the equity of redemption of the defendant in and to the said property be forever closed.

Now, therefore, this is to command you to sell said property described as aforesaid, and to apply the proceeds thereof to the satisfaction of said judgment, debt, interest, and costs that have accrued up to this date, and all accruing costs; and if the proceeds of such sale should be insufficient to satisfy said debt, interest, and cost, then the plaintiff shall have execution for the residue thereof; and should there remain a surplus after satisfying the debt, interest, and costs of this suit, then that the same be paid over to defendant; and of this writ make due return within the time prescribed by law; in this fail not under the penalties of what the law directs in such cases made and provided.

Witness G. W. Lee, clerk of the district court of Sutter county, with the seal thereof hereunto affixed, this 11th day of Nov., 1853.

[SEAL.]

G. W. LEE, *Clerk*.

I hereby certify that I received the within judgment and order

of sale on the 15th day of Nov., 1853, and levied the same on the 16th Nov., 1853.

M. F. GAAR, *Sheriff*.

I certify that by virtue of the within order of sale I levied upon the within described tract of land on the 16th day of Nov., 1853, and advertised to sell the same on the 15th day of December, same year, and that on the last named day I sold the same to F. Arthur for one thousand dollars, the same being the highest bid, the receipt of which sum is hereby acknowledged.

Nicolaus, Dec. 16th, 1853.

M. F. GAAR,
Sheriff Sutter County, Cal.

STATE OF CALIFORNIA,
County of Sutter, ss.

I, G. W. Lee, clerk of the district court within and for said county, do hereby certify that the foregoing is a full and complete and perfect transcript of the record on file in the above entitled cause remaining in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said district court, at Nicolaus, this the 12th day of July, A. D. 1854. [SEAL.]

G. W. LEE,
County Clerk of Sutter Co. and ex-officio Clerk Dist. Court 10 Judicial Dist., Cal.

STATE OF CALIFORNIA,
County of Sutter, ss.

I, B. J. Hurlburd, county judge within and for said county, do hereby certify that G. W. Lee, the person who signed the above certificate as clerk of the district court aforesaid, was, at the time of signing the same, and is now, the county clerk of said county and ex-officio clerk of the district court thereof.

B. J. HURLBURT,
Judge Sutter County, Cal.

STATE OF CALIFORNIA,
Sacramento County, ss.

I, William T. Barbour, judge of the district court of the tenth judicial district within said State, (composed of the counties of Sutter, Yuba, Nevada, and Sierra,) do certify that Geo. W. Lee, whose name appears to the foregoing certificate of the record foregoing, was, at the time of signing the same, and now is, county clerk of said Sutter county, duly elected, sworn, and qualified as such county clerk, and ex-officio clerk of the district court of Sutter county, and that his signature to said certificate is genuine, and that said certificate is in due form of law, and full faith and

credit are due and ought to be given all his official acts as such clerk as in courts of law and equity.

In testimony whereof I have hereto set my hand and seal, at [SEAL.] Nevada City, this 13th day of Sept., 1854.

WM. T. BARBOUR,
Dist. Judge 10 *Judicial District, Cal.*

There was also sent down with the transcript of the orders had in the State court of McLennan county, and the petition and transcript from California aforesaid, the following papers, all of which said papers *all of which said papers* are endorsed by the then clerk of the United States district court at Austin, as having been filed on the 2d day of Oct., 1856.

(And signed) W. P. DE NORMANDIE, *Clerk.*

And are in words, to wit:

Writ of Attach't McLennan County.

Writ of Attachment from McLennan county, ss.

THE STATE OF TEXAS,
The County of McLennan.

To the Sheriff of the County of McLennan, greeting:

We command you, that you attach so much of the property of Thomas J. Green, if to be found in your county, repleviable on security, as shall be of value sufficient to make eleven thousand nine hundred and thirty dollars, and costs, to satisfy the demand of William Custard, and such property so attached in your hands to keep and secure, that the same may be liable for further proceedings thereupon to be had at the district court to be held in McLennan county on the sixth Monday after the first Monday in April, A. D. 1855, so as to compel the said Thomas J. Green to appear and plead to the complaint of William Custard, when and where you will make known how you have executed this writ.

Herein fail not and make due service and return hereof of this writ according to law.

Attest: J. R. HARRIS,
Clerk of the Dist. Court aforesaid.

Given under my hand, and impress of the seal affixed at office, in Waco, in said McLennan county, this 10th day of [SEAL.] April, A. D. 1855.

J. R. HARRIS,
D. C. McL. Co.

Said writ is endorsed in words and figures, to wit:

Received 10th day of April, 1855.

A. E. TWADDELL, *Sheriff.*

Citation from McLennan C'y Court.

Citation from McLennan County Court, ss.

THE STATE OF TEXAS, *McLennan county.*

To the Sheriff of said McLennan County, greeting:

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

Whereas William Custard, a resident citizen of the county of Travis, State of Texas, has filed his petition in the district court of McLennan county, in which, among other things, petitioner states that he is the owner of a judgment rendered on the 13th day of October, 1853, in the district court for the county of Sutter, in the State of California, in favor of Francis Arthur against Thomas J. Green for the sum of five thousand dollars, together with interest thereon at the rate of three per cent. per month from the 9th day of Dec., 1851, until paid, with the further sum of two hundred and eighty dollars, costs of suit; which said judgment petitioner alleges he is now the owner of by written assignment for a valuable consideration; that only one thousand dollars of said amount has been paid, which amount was paid upon said execution issued upon said judgment by sale on the 15th day of December, 1853; that the residue, amounting up to the sum of eleven thousand nine hundred and thirty dollars, is justly due to petitioner.

Petitioner further states that he, the said Green, is a non-resident of the State of Texas, and resides in the State of Massachusetts; that petitioner is informed and believes that the said Green has property within the jurisdiction of the district court for the county of McLennan, and also in the counties of Harris and Bosque. Petitioner prays for a writ of attachment directed to the sheriff of McLennan county, and for branch writs of attachment to the said counties of Harris and Bosque, properly directed, and for judgment for the sum of five thousand dollars, with interest from the 1st day of December, 1851, at the rate of three per cent. per month, together with two hundred and eighty dollars costs of original suit, and for costs, an affidavit having been made by William Custard, the petitioner, that the residence of said Thomas J. Green is not within the State of Texas.

You are hereby commanded to summon the said Thomas J. Green, by making publication of this citation in the Waco Weekly Era, a newspaper published in the town of Waco, in the said county of McLennan, Texas, for four successive weeks, to appear before the hon. district court of McLennan county, Texas, on the sixth Monday after the first Monday in April, A. D. 1853, to answer said complaint.

Herein fail not, but make due service and return of this citation as the law directs.

Attest:

J. R. HARRIS,
Clerk of the District Court aforesaid.

Given under my hand, and the impress of the seal of said court, affixed at office in Waco, in said county of McLennan, this 10th day of April, A. D. 1855.

[L. S.]

J. R. HARRIS,
D. C. McL. C., Texas.

In obedience to the above I order the same to be published in the Waco Weekly Era for four successive weeks.

April 10th, 1855.

A. E. TWADDELL,
Sheriff.

Writ of Attachment to the Sheriff of Bosque County.

STATE OF TEXAS, *McLennan County.*

To the Sheriff of Bosque County, greeting:

Whereas William Custard filed his petition in the office of the clerk of the district court of McLennan county, against Thomas J. Green, alleging that said Green is indebted to him upon a judgment rendered in the district court of the county of Sutter, in the State of California, in favor of Francis Arthur, amounting up to the 9th day of March, 1855, to the sum of eleven thousand nine hundred and thirty dollars, and prayed for a writ of attachment against the goods and chattels, lands and tenements, of the said Thomas J. Green, to be directed to the sheriffs of the counties of McLennan, Harris, and Bosque, and filed the affidavit and bond required by law to entitle him to said writs of attachment (as you have been before commanded,) you are hereby commanded to attach so much of the goods and chattels, lands and tenements, of the said Thomas J. Green, if to be found in your county, repleviable on security, as will be of value sufficient to make the sum of eleven thousand nine hundred and thirty dollars and costs of suit, to satisfy the demand of William Custard, and such property in your hands so attached to keep and secure, that the same may be liable for further proceedings to be had thereon by the district court of McLennan county, on the sixth Monday after the first Monday in October, 1855, so as to compel the said Thomas J. Green to appear and plead to petition of plaintiff, Wm. Custard, when and where you will make known how you have executed this writ.

Herein fail not to make due service and return of this writ according to law.

Attest:

J. R. HARRIS,
Clerk of the District Court of McLennan County, Texas.

Given under my hand and the impress of the seal of the said court, affixed at office in Waco, in said county of McLennan, this 21st day of May, 1855.

[L. S.]

J. R. HARRIS, *D. C. McL. Co., Texas.*

Return.

Come to hand this 21st day of May, 1855, and levied upon the following described tract of land, situated in Bosque, and granted to the defendant, Thomas J. Green, containing seventeen and two-third labors, and bounded as follows, to wit: beginning at the N. E. corner of Sophia A. John's 8,000-acre survey, from which a walnut bears N. 48° E. 62 varas, marked W., an elm bears N. 38½ W. 20 vs.; thence S. 60 W. at 3,200 vs., branch 4,420 vs., another 5,850 vs., to a mound; thence N. 30 W. 3,020 vs. to corner; thence N. 60° E. 740 vs., branch 797 vs., another 5,017 vs., another 5,850 vs., to a corner, from which a Spanish oak bears S. 41° E. 11 vs., marked H, a live oak bears S. 88 W. 30 vs., marked K; thence S. 30 E. 1,765 vs., branch 2,941 vs., middle fork of Meridian creek, 3,020 vs. to the place of beginning; also, 640 acres granted to the defendant, Green, situated on the waters of the middle fork of Meridian creek, beginning at the S. E. corner of a survey made for A. J. Cloud, from which an elm marked A bears N. 61½ W. 30 vs.; a white oak marked B bears N. 51½° E. 24 vs.; thence S. 30 E. at 126 vs., a branch at 1.846 vs., another at 3,650 vs., S. E. corner in prairie; thence S. 60° W. at 825 vs., a stake on the E. line of another survey made for said Green; thence N. 30 W. 2,390 vs. to the N. E. corner of a larger survey, from which a Spanish oak marked I bears S. 49 E. 11 vs., a live oak marked K bears S. 88 W. 30 vs.; thence S. 60 W. at 480 vs., a corner from which a Spanish oak marked H bears S. 2 W. 75 vs., another marked I bears S. 1½ W. 76 vs.; thence N. 30 W. at 1,260, the N. W. corner a mound; thence N. 60° E. 1,305 vs. to the place of beginning.

JOHN MARSHALL, *Sheriff B. C.*

Amended Petition.

Amended petition, in words, to wit:

Filed 16th day of May, 1855.

J. R. HARRIS, *D. C. McL. Co.*

WILLIAM CUSTARD vs. THOMAS J. GREEN. } No. 207.

And now, at this term, comes the plaintiff, by his attorney, leave of the court first had and obtained, and amends his original petition in this cause, and for amendment alleges, that neither the service by publication, nor writs of attachment in this cause, have been executed; he further represents that the affidavit required by

the statute to procure an attachment before the clerk of this court, and bond given and approved as required by law.

Wherefore he prays for writs and citation, as prayed for in his original petition, returnable at the fall term of the district court of McLennan county, and for judgment, as prayed for in his original petition, and for all such other relief as this case may require.

HAMILTON & CHANDLER,
Att'ys for Pl'ff.

Defendant's Answer.

Defendant's answer, in words, to wit:

In the District Court of McLennan county—Spring Term, A. D. 1856.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

In this cause now comes the defendant, Thomas J. Green, and for answer to the petition of plaintiff says, that he denies all and singular the allegations of the said plaintiff in his said petition contained, and says that the same are not true, as therein stated, and of this he puts himself upon the country.

And answering further he says, that he does not owe any such judgment or sum of money as is alleged in the said petition, unto the said plaintiff, in the manner and form as is therein alleged, and of this he puts himself upon the country.

And answering further he says, that there is no such record of any judgment as is set forth in the said petition, and this he prays may be inquired of by the court.

HARRISON & EARLE,
JNO. A. & R. GREEN,
Atto's for Defendant.

Motion to remove cause to U. S. Court.

Motion to remove cause to United States court. Filed 30th May, A. D. 1855.

J. R. HARRIS,
D. C. McL. Co.

WM. CUSTARD
vs.
THOMAS J. GREEN.

And now comes the defendant, Thomas J. Green, by his attorney, and moves that the above entitled cause be removed into the district court of the United States, at the next term thereof, to be held in the city of Austin, in the district of Texas, and that this court proceed no further in this cause; and the said defendant assigns the following grounds of this motion: Because the de-

fendant is a citizen of the State of Massachusetts, and this suit is instituted against him by a citizen of the State of Texas, for the recovery of a judgment against him for more than five hundred dollars, to wit, the sum of five thousand dollars, with interest at the rate of three per cent. per month, from the 9th day of December, 1851; and further, because defendant has filed his bond in this cause for the removal thereof as prayed.

HARRISON & EARLE,
JNO. A. & R. GREEN,
Att'ys for Def't.

Bond for Removal.

And, to wit, on the 30th day of May, 1855, the defendant filed his bond for the removal of this case to the U. S. court, which bond is endorsed: Filed 30th May, 1855—J. R. Harris, D. C. McL. co.

We, Thomas J. Green, as principal, and Thomas Harrison and J. B. Earle as sureties, to owe and to be indebted unto William Custard in the sum of five hundred dollars, which sum, well and truly to be paid, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed with our names and sealed with our seals, (using scrawls for seals,) and dated this 30th day of May, 1856.

The condition of this obligation is such, that whereas the said Thomas J. Green has filed his motion in the district court of McLennan county, for the removal of a suit brought by William Custard against him for the recovery of a judgment for the sum of five thousand dollars, with interest, at three per cent. per month from the 9th day of Dec., 1851, (the said suit being on the docket of said district court as No. 207,) to the next term of the district court of the United States for the district of Texas, to be held at Austin, in said State:

Now, if the said Thomas J. Green shall enter into the district court of the United States as aforesaid, at its next term, at Austin as aforesaid, on the first day of the session thereof, copies of the process sued out against him by the said Custard, then this bond to be void, otherwise to be in full force and effect.

THOS. J. GREEN, [SEAL.]
By his Attorney, THOS. HARRISON.
THOS. HARRISON, [SEAL.]
J. B. EARLE. [SEAL.]

Approved.

R. E. BAYLOR,
Judge, &c.

Notice of Filing Power of Attorney.

And, to wit, on the 12th Nov., 1855, endorsed Filed on that date—J. R. Harris, D. C. McL. co.—in words, to wit:

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In District Court—Fall Term, 1855.

THE STATE OF TEXAS,
McLennan County.

WILLIAM CUSTARD
vs. } No. 207.
THOMAS J. GREEN.

To the defendant, Thomas J. Green, or Thomas Harrison, or J. B. Earle, his attorneys of record:

You or either of you are hereby notified that we have filed in the papers of the above stated cause the power of attorney from Francis Arthur to Charles W. Greene, and the deed or transfer from said Arthur to his agent, Charles W. Greene, to the plaintiff, William Custard, conveying the judgment sued by the plaintiff, which power of attorney and deed will be read in evidence on the trial of the above stated cause.

Nov. 12th, 1855.

HAMILTON & CHANDLER, *for Pl'ff.*

We accept service of the above notice.

Nov. 12th, 1855.

HARRISON & EARLE,
Att'ys for Def't.

Notice to produce Patents.

And afterwards, as appears by the endorsement of filing—Filed 16th November, 1855.

J. R. HARRIS,
C. D. C. McL. C.

In District Court—Fall Term, 1855.

THE STATE OF TEXAS,
McLennan County.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

To the defendant, Thomas J. Green, or Thomas Harrison, attorneys of record:

You or either of you are hereby notified to produce at the trial of the above stated cause the original patents issued to the defendants for the land described in the levies and returns of the sheriff of McLennan, Bosque, and Harris, upon the writs of attachment executed by them, or in default thereof plaintiff will read in evidence certified copies of said patents.

Nov. 16th, 1855.

HAMILTON & CHANDLER,
Att'ys for Plaintiff.

Said notice is endorsed:
Service accepted Nov. 16th, 1855.

HARRISON & EARLE.

Demurrer and Amended Answer U. S. D. C., Austin.

And afterwards, to wit, in the district court of the U. S., at Austin, the def't filed a demurrer and amended answer, endorsed—
Filed 27th day of Nov., 1856.

W. P. DE NORMANDIE, *Cl'k.*

CUSTARD
vs.
GREEN.

And now comes the defendant in the above entitled cause, and demurs to the plaintiff's petition in the above entitled cause, and says that the matters therein alleged are insufficient in law to entitle the said plaintiff to any relief; wherefore he prays judgment, &c.

J. A. & R. GREEN,
Def't's Att'ys.

And for amended answer the defendant says that the judgment alleged by said plaintiff to have been obtained against him in the State of California, if obtained at all, was so obtained without any personal notice to this defendant, who was not then a resident of the State of California, and that he never appeared or answered to any proceedings in said judgment, but that the same is utterly void; wherefore he prays judgment, &c.

JOHN A. & R. GREEN,
Att'ys for Def't.

By replication to the above plea, plaintiff, by his attorney, comes now and says that the facts set forth in said plea are not true, and he here takes issue upon said plea.

HAMILTON & CHANDLER,
Pl'ff's Att'ys.

Amended Petition.

And afterwards, plaintiff, by attorney, filed an amended petition, which is endorsed—
Filed Nov. 29th, 1856.

W. P. DE NORMANDIE, *Clerk.*

UNITED STATES OF AMERICA,
District of Texas.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

And now on this day comes the plaintiff in the above entitled

cause, by his attorneys, and by leave of the court files this amendment to his original petition.

Plaintiff states, in addition to matters and things set forth in said original petition, that the judgment described in said original petition, as having been rendered against the defendant, Thomas J. Green, in the district court for the county of Sutter, in the State of California, on the 13th day of Oct., 1855, in favor of Francis Arthur for five thousand dollars, together with interest thereon, at the rate of three per cent. per month from the 9th day of December, 1851, was rendered by said district court, county of Sutter, after having acquired jurisdiction of the said cause, and the defendant therein, the said Thomas J. Green, in full and strict compliance with the statute laws of the said State of California, in relation to service of process upon parties defendant when absent from the aforesaid State, and that said jurisdiction of said court being legally obtained in said cause over the said defendant, the said court properly exercised the power to render a final and definitive judgment in the premises. That by the statute of the said State of California, it is, among other things, provided, touching the manner of commencing civil actions as follows, to wit:

Sect. 22. Civil actions in the district court, supreme court of the city of San Francisco, and the county courts, shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, and the issuance of a summons thereon.

Sect. 23. The clerk shall endorse on the complaint the day, month, and year the same is filed; and at any time after the filing the plaintiff may have a summons issued. The summons shall be signed by the clerk and directed to the defendant, and be issued under the seal of the court.

Sect. 24. The summons shall state generally the nature of the action, the parties thereto, the court in which it is brought, the county in which complaint is filed, and require the defendant to appear and answer the complaint within the time mentioned in the next section, after service of summons, exclusive of the day of service, or that judgment by default will be taken against him.

Sect. 25. The time in which the summons shall require the defendant to answer the complaint shall be as follows:

1st. If the defendant is served in the county in which the action is brought, ten days.

2d. In all other cases, forty days.

Sect. 26. There shall also be inserted in the summons a notice, in substance, as follows: In an action arising on contract for the recovery only of money or damages, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint. 2d. In other actions, that if the defendant fail to answer the complaint, the plaintiffs will apply to court for the relief demanded therein.

Sect. 27. In an action affecting the title to real property, the plaintiff at the time of filing the complaint, or at any time afterwards, may file with the recorder of the county in which the property is situated a notice of the pending of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby.

Sect. 28. The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a judge of the court in which the action is brought. A copy of the complaint, certified by the clerk, shall be served with the summons. The summons shall be returned with the certificate or affidavit of the officer of its service and of the service of the copy of the complaint to the office of the clerk from whence the summons issued.

Sect. 29. The summons shall be served by delivering a copy thereof attached to the certified copy of the complaint, as follows:

1st. If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, or managing agent thereof.

2d. If against a minor under fourteen years of age, to such minor personally, and also to his father or guardian; or if there be none within the State, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

3d. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such guardian.

4th. In all other cases, to the defendant personally.

Sect. 30. When the person on whom the service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, and the fact shall appear by affidavit to the satisfaction of the court, or a judge thereof, or a county judge, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, by the publication of the summons.

Sect. 31. The order shall direct the publication to be made in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week, provided that publication against a defendant residing out of the State or absent therefrom shall not be less than three months. In case of the publication where the residence of a non-resident or absent defendant is known, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, addressed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons or complaint out

of the State shall be equivalent to publication and deposit in the post office. In either case, the service of the summons shall be deemed complete at the expiration of the time prescribed for the order of publication.

In actions upon contracts for the direct payment of money, the court, in its discretion, may, instead of ordering publication, or may, after publication, appoint an attorney to appear for the non-resident, absent, or concealed defendant, and conduct the proceedings on his part.

Sec. 32. Where the action is against two or more defendants and summons served on one or more, but not on all of them, the plaintiff may proceed as follows:

1st. If the action be against the defendants jointly indebted upon a contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment it may be entered against all the defendants thus jointly indebted, so far only that it may be enforced against the joint property of all, and the separate property of the defendants served.

2d. If the action be against defendants severally liable, he may proceed against the defendant served in the same manner as if he were the only defendant.

Sec. 33. Proof of the service of the summons shall be as follows: 1st. If served by the sheriff or his deputy, the affidavit or certificate of such sheriff or deputy. 2d. If by any other person, his affidavit thereof; or, 3d, in case of publication the affidavit of the printer, or his foreman or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post office if the same shall have been deposited; or in case of service otherwise than by publication, the certificate or affidavit shall state the time and place of the service.

Sec. 35. From the time of the service of the summons, and a copy of complaint in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to a personal service of the summons upon him.

And plaintiff avers that the mode of perfecting service on a defendant who is absent from said State of California—*is* in the preceding provision set forth—were in all things strictly complied with in effecting notice to the defendant preparatory to the rendition of the aforesaid judgment.

Wherefore plaintiff says that the service was good and valid, and conferred on said court of the person of the said defendant, and that said judgment so rendered as aforesaid was a final and conclusive judgment against said defendant in the said State of California, and binding upon him as such.

Wherefore plaintiff says that said judgment is a good cause of

action, and entitled him (pl'ff) to judgment as prayed for in his original petition.

HAMILTON & CHANDLER,
Atty's for Plaintiff.

Amended Petition.

And afterwards, to wit, on the 3d day of December, 1856, pl'ffs filed their amended petition, which is in words, to wit:

Endorsed: Filed Dec. 3d, 1856.

W. P. DE NORMANDIE, *Clerk.*

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

UNITED STATES OF AMERICA,
District of Texas.

And now on this day comes the plaintiff by leave of the court, and files this his amendment to his original petition, and for amendment says that the judgment described in said original petition, as rendered against the defendant, Thomas J. Green, in the said county of Sutter, in the said State of California, was rendered by said district court upon a note of hand executed by the said defendant, Thomas J. Green, in the State of California, which said note is in the words and figures following, to wit:

$5,000. SAN FRANCISCO, 9 *December,* 1851.

Nine months after date, I promise to pay Francis Arthur, or order, five thousand dollars, with interest at the rate of three per cent. per month from date till paid, for value received. Witness my hand and seal.

THOMAS J. GREEN. [SEAL.]

That by the execution and delivery of said note by the said deendant to the said Francis Arthur, in the State of California, all which is averred, he, the said defendant, became liable to pay to said Francis Arthur, or order, the sum of money therein specified, with the interest as therein stipulated from the date of the execution of said note; that said note, together with the judgment thereon rendered, as set forth in plaintiff's original petition, were both in due course of trade regularly transferred and assigned to plaintiff prior to the commencement of this suit, to wit, on the day of , for a valuable consideration, whereby plaintiff became entitled to demand and have from said defendant the said amount of five thousand dollars, with interest thereon at the rate of three per cent. per month from the date of said note until paid. And plaintiff further says that said note has not been paid, or any part thereof, either to said Arthur or to plaintiff, or to any other person or persons for them or either of them, before or since the

rendition of said judgment in Sutter county, in the State of California, as described in plaintiff's original petition. And plaintiff now asks a judgment on said note against said Green, and makes the said note a cause of action herein, and prays that the same may be considered in connection with the judgment described in plaintiff's original petition.

And plaintiff further avers, that at the date of the execution of the note hereinbefore described, the said defendant was a resident and a citizen of the State of California until the commencement of the suit brought against him in the district court of Sutter county, in said State of California, in which cause was rendered the judgment described in plaintiff's original petition, and was at the commencement of said suit subject to the jurisdiction of the laws of the State of California touching service of process upon defendants to bring them into the courts of said State; and that being so subject, he, the said defendant, was in said suit properly served with process, and the same authorized the rendition against him of a valid and conclusive judgment, such as was rendered, and that the same is a good and valid cause.

Plaintiff prays for judgment upon his said cause of action, and for costs, and for general relief.

HAMILTON & CHANDLER, *for Plaintiff*.

Order sustaining Demurrer.

And afterwards, to wit, on the 2d Dec., 1856, the following proceedings had in this cause appear upon the minutes of this court in this cause in words, to wit:

WM. CUSTARD, Plaintiff,
vs.
THOMAS J. GREEN, Defendant. } No. 171.

This day came the parties aforesaid by their attorneys, and the demurrer filed in this cause by the defendant came on to be heard; whereupon, upon motion of plaintiff's attorney, it was sustained by the court; and thereupon plaintiff asked leave to amend his pleadings, which was granted.

And afterwards, on the 2d day of June, 1857, the following proceedings had in this cause appear upon the record of the minutes of this court, to wit:

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

This day came the plaintiff by his attorney, and on motion it is ordered by the court that he have leave to amend.

Demurrer of Defendants.

And afterwards, to wit, on the 16th day of June, 1857, the defendants filed their amended answer in this cause, which is in words, to wit:

U. S. District Court—June term, 1857.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

And now, at this term, comes the defendant and demurs to the several amended petitions, as well as the original petition filed in the said cause, and says the same are insufficient in law to authorize any judgment against this defendant, and for special cause of exception to the amended petition of pl'ff filed Dec. 3d, 1856, he says the same embodies a new and substantive cause of action from that embraced in the original and previous amended petitions; and for further cause, he says that said cause of action, if any, on said promissory note accrued more than four years before said amended petition, in which it is declared was filed, as appears from said amended petition. Wherefore def't prays judgment against said plaintiff, and that he pay all costs of this suit.

And answering, the defendant says that the said Francis Arthur is still the real party in interest in said claim against the defendant, and so was at the commencement of the suit, and that said Arthur has received on said note the sum of one thousand dollars on the 6th day of Nov., 1855, and took possession of the tract of land belonging to this defendant described in said transcript filed as an exhibit with the original petition in this cause, and appropriated the rents, profits, and proceeds of the same to his own use, whereby he has had and received to his own use the money justly belonging to your petitioner to the amount of five thousand dollars, and has sold the same, or portions thereof, to the amount of eighteen thousand dollars, for which sums of money defendant prays judgment, &c.

And further answering, defendant says, by way of plea, that the promissory note sued on in this case was due more than four years before the same was sued upon, and the cause of action, if any, was thereby barred by lapse of time, wherefore def't prays judg't.

JOHN A. & R. GREEN, *Atty's.*

Replication and Amended Petition.

And on the same (16) day (June, 1857,) the plaintiff filed their replication and amended petition, which is in words, to wit:

Filed June 16, 1857.

M. HOPKINS, *Clerk.*

U. S. District Court, western dist. of Texas—June term, 1857.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

And now comes the plaintiff by his attorneys, and by way of exception and replication to defendant's amended answer and plea filed herein on the day of June, 1857, and says:

1st. That he excepts to so much of said answer as avers that one Francis Arthur is still the real party in interest in said claim against the defendant, and so was at the commencement of the suit, and says that said allegation is *irrevalent*, impertinent, and immaterial, and that said plaintiff ought not to be required to answer the same; wherefore he prays judgment of the court whether the same should not be stricken from said answer.

A. J. HAMILTON, *for Plaintiff*.

And for replication to said defendant's said amended answer plaintiff says, in the event of his foregoing exception being overruled, answers and says, it is not true that said Francis Arthur is the real party in interest in the claim sued upon, but that the said claim is now the property of this plaintiff.

Plaintiff further answering, says that the judgment rendered in the State of California, as set out in plaintiff's original petition, was rendered against the said defendant, Green, in favor of said Arthur, as therein stated; that said judgment was rendered upon a mortgage executed by said defendant *to said defendant* to said Arthur to secure the payment of the note set out in plaintiff's amended petition, filed on the 3d December, 1856, and that the tract of land which was the subject of was by the aforesaid judgment ordered to be sold in satisfaction thereof, and was so sold according to the orders contained in the aforesaid judgment, and purchased by said Francis Arthur for one thousand dollars, whereby he, the said Arthur, became the legal owner of said land, and entitled thenceforth to the possession, rents, issues, and profits thereof, the said defendant, by virtue of said judgment and sale, having been divested of all title and interest in and to the same, all of which will more fully appear by reference to the transcript of the judgment and proceedings in said cause herein filed as an exhibit to plaintiff's original petition; wherefore plaintiff says, that the defendant is not entitled to the damages claimed by him in his said amended answer, nor to any portion thereof; wherefore, &c.

3d. And for further replication to said amended answer, and the plea of the statute of limitations of four years therein contained, plaintiff says that his said cause of action, nor either of them, the said judgment, nor the said note, are barred by the lapse of four years, as alleged in defendant's said plea; that at the date of the execution of said note, the said defendant, Green, was a citizen of the State of Clalifornia, exercising all the rights, privileges and immunities of a resident citizen thereof; that after the execution and delivery of said note to said Arthur, and before the maturity thereof, he, the said Green, left the State of California, as he then

alleged, for the eastern cities of the United States, and from thence to some part of the continent of Europe.

That said defendant gave no further intimation to said Arthur, who was then the holder and owner of said note (and so remained until after the rendition of judgment herein originally declared on,) of any other place where he domiciliated, or intended to reside or domiciliate himself, the said Arthur not knowing his, the said *Arthur's*, whereabouts, but believing him, from his own declarations made prior to leaving California, in or on the said continent of Europe, and remaining in ignorance of his domicile (the said Green not advising him to the contrary,) and hoping for the return of the said Green to California, until shortly before the commencement of the aforesaid suit in California. That said Arthur remained in ignorance of said defendant's domicile or whereabouts until after the rendition of said judgment in California, and until within two years next preceding the filing of the amended petition herein, setting up the aforesaid original note; and he says that he, the said Arthur, during the period he was the owner and holder of said note and judgment from and after maturity, nor this plaintiff after he acquired the right thereto, knew of the domicile of the said Thomas J. Green, defendant, or could ascertain the same until within less than four years next preceding the filing of plaintiff's amended petition herein setting up said original note, and less than four years prior to the commencement of plaintiff's said suit. And plaintiff further avers, that he was not aware of the fact that said defendant had claimed or owned any lands or other property in the State of Texas, upon which to base an attachment, until less than one year before the commencement of this suit; wherefore plaintiff says, that the statute of limitations of four years, as pleaded by defendant, did not commence to run until the residence or domicile of the said defendant was known as aforesaid. Wherefore, &c.

And plaintiff prays for judgment upon said transcript of judgment, and interest thereon, or, in the alternative, judgment upon said original note, with interest thereon as stipulated therein, and for general relief, &c.

A. J. HAMILTON,
Att'y for Plaintiff.

Order of Continuance.

And afterwards, to wit, on the 16th day of June, 1857, the following proceedings were had in this case, as appears from the records of the minutes of this court, in words, to wit:

WILLIAM CUSTARD
vs. } No. 171.
THOMAS J. GREEN.

And now, on this day, came the parties by their attorneys, and the plaintiff having filed his replication and amended petition, and

the defendant his demurrer and amended answer thereto, on application of the plaintiff this cause was continued as on his affidavit, and at his charge.

Interrogatories.

And on the 27th day of Aug., '57, the following interrogatories were filed by the plaintiff in this case, in words, to wit, appears among the papers of this cause, and are in words, to wit:

Filed Aug. 27th, 1857.

M. HOPKINS, *Clerk.*

United States District Court for the western district of Texas.

WM. CUSTARD
vs.
THOMAS J. GREEN.

To Thomas J. Green, or his attorney of record in the above stated cause:

You will please take notice, that five days after the service hereof, we will sue out a commission from the clerk of the United States district court for the western district of Texas, directed to persons of his confidence in the State of California, authorizing them to take the answers of the following named citizens of said State of California to the following interrogatories, to wit: David A. Douglass, Hugh C. Murray, David S. Terry, P. Burnett, W. S. Long and J. R. Hardenburgh, which said interrogatories and answers the plaintiff will use as evidence on the trial of the above stated cause.

HAMILTON & CHANDLER, *Att'ys for Pl'ff.*

To each of the witnesses:

Int'y 1st. Are you acquainted with the parties to the above named suit?

Int'y 2d. If, in answer to interrogatory 1st, you say you are acquainted with the defendant, Thomas J. Green, then state where you knew him, and when? Where did your acquaintance with him commence, and how long did it continue; and where did he reside?

Int'y 3d. If, in answer to 2d interrogatory, you say that the defendant resided in California, state particularly when such residence commenced and how long it continued; at what period did said defendant leave California, (if at all,) and with what declaration of intention (if any) as to his future residence; and please state particularly whether or not said defendant, during his residence in California, claimed citizenship in said State, and exercised any rights or privileges peculiarly appertaining to a resident citizen of said State. Did he hold any office under the constitution and laws of the State of California; and if so, what was that office; and did he avail himself of the privileges thereof, and discharge its duties and functions?

Int'y 4th. If, in answer to the foregoing interrogatories, you say that the defendant resided in California, and that he held office in said State, then state when he abandoned his said residence therein, or when was publicity given to the fact of such abandonment or change of residence, if any occurred? And if you say he left the State at any time, what were his declarations (if any) in regard to his future residence and citizenship?

Int'y 5th. If you say that the defendant left California, then state for what point, or to what country did he say he was going, and how long did he say he would be absent?

Int'y 6th. Has the said defendant ever returned to California? And if not, please state how long it was after he left until it was known that he had abandoned his residence in California; and how long it was after he left before you were informed of his having acquired a fixed residence elsewhere than in California. Please state everything within your knowledge, touching the facts embraced in the foregoing interrogatories, as fully as if specially interrogated thereto.

HAMILTON & CHANDLER,
Plff's Att'ys.

Said interrogatories were returned by the marshal in words, to wit:

Came to hand Aug. 27, '57, and executed the same by delivering to def't's attorneys, John A. and R. Green, a certified copy of the notice and interrogatories on the 27th of Aug., 1857.

W. C. YOUNG,
U. S. M. W. D. T.
By CHAS. CONEY, *Dep'ty.*

Marshal's fees: Service, 75 c.

Cross Int'es.

And afterwards, on the 2d Sept., 1857, def't filed X-int. to the above named witnesses in the above entitled cause, in words, to wit:

Filed Sept. 2d, 1857.

M. HOPKINS, *Clerk.*

WM. CUSTARD
vs. } No. 171.
THOMAS J. GREEN.

Cross-interrogatories to D. F. Douglass, H. C. Murray, D. E. Terry, P. H. Burnett, W. S. Long, and J. R. Hardenburg.

X-int'y 1st. If you state that you knew the defendant, Thomas J. Green, when he left California, state what facts you know relative to his departure, if any, which induced you to believe that he would not return.

X-int'y 2d. State whether said Green had left any agent in the

country to attend to his affairs during his absence; and if so, who was it?

X-int'y 3d. State whether said Green had his family or permanent residence in California?

X-int'y 4th. State where said Green went when he left California, and where did he remain for the next two years?

X-int'y 5th. State if you know where said Green and his family resided before he went to California, when he went there, and how long he staid there.

X-int'y 6th. If you state that he held office there, state also whether it was not vacated by his abandonment of the State. Say what office it was, how much of the term was left unexpired, and state particularly how long it was after he left before it was filled by another appointment.

X-int'y 7th. State when you first became convinced in your own mind that Green would not return to California, and what circumstances or facts brought you to this conclusion.

JOHN A. & R. GREEN,
Att'ys for Def't.

And afterwards, to wit, on the 5th day of September, 1857, a commission was issued directed to John Heard, judge of the county court of Sacramento city, or R. M. Wilson, notary public of said county, to take the answers to the above and foregoing direct and cross-interrogatories, filed in the case of Wm. Custard vs. Thomas J. Green to David F. Douglas, Hugh C. Murray, David S. Terry; P. H. Burnett, W. S. Long, and J. R. Hardenburgh, which commission and answers to int's are in words, to wit:

Commission.

United States of America, District Court of the United States, western district of Texas, holding sessions at Austin.

To the Honorable John Heard, Judge of the County court of Sacramento county, or to R. N. Wilson, esq., notary public of said county, or either of them.

Know ye that, reposing special trust and confidence in your integrity and ability, we hereby authorize and require you to cause to appear before you David F. Douglass, Hugh C. Murray, David S. Terry, P. H. Burnett, W. S. Long, and J. R. Hardenburgh, citizens of the State of California, and take their answers to the annexed certified copies of interrogatories and cross-interrogatories in the case of William Custard vs. Thomas J. Green, No. 171, in our district court of the United States for the western district of Texas, at Austin sitting.

You are to reduce the answers to writing, and cause the same to be signed and sworn to in your presence by the subscribing wit-

nesses, and certify, under your hand and seal of court, that they were so signed and sealed before you.

You are to seal them up in an envelope, with this commission and the copies of the interrogatories and x-interrogatories, and sign your name across the seal of the envelope, and endorse on the envelope the names of the parties to the suit, and the names of the witnesses, and direct the same to the clerk of the district court of the United States for the western district of Texas, at Austin, Texas; and herein fail not.

Witness the Honorable Thomas H. Duval, judge of said court, and a seal of said court, at Austin, this fifth day of Sept., anno Domini eighteen hundred and fifty-seven.

[L. S.]

MATTHEW HOPKINS, *Clerk.*

Depositions.

The answers to the interrogatories and x-interrogatories filed in this case to David F. Douglas, Hugh C. Murray, David S. Terry, P. H. Burnett, W. S. Long, and J. R. Hardenburgh, *is* in words, to wit:

STATE OF CALIFORNIA,
City and County of Sacramento.

In accordance with a commission issued from the office of the clerk of the district court of the United States for the western district of Texas, (holding sessions at Austin,) dated the 5th day of September, A. D. 1857, in the case of William Custard vs. Thomas J. Green, in said court pending, to take the depositions of David F. Douglass, Hugh C. Murray, David S. Terry, P. H. Burnett, W. S. Long, and J. R. Hardenburg, to interrogatories and cross-interrogatories propounded to them in said case hereto annexed, I, N. R. Wilson, a notary public within and for the county of Sacramento and State of California, between the 26th day of October, 1857, and the 15th of Nov., A. D. 1857, and having sworn each of them to make true answers to said interrogatories, they answered respectively as follows:

W. S. Long, of the city of Sacramento, of lawful age, being first duly sworn, deposes and says as follows:

To the first interrogatory he answers: I am acquainted with the defendant, Thomas J. Green.

Answer to the second interrogatory. I knew him in California; My first acquaintance with him was made at San José, California. I knew that he left the State in the month of May or June, 1852, because at that time I went to the Atlantic States myself, and Gen. Green, the defendant, was aboard the same ship with me, and I have never seen him in this State since, or heard of his being here. I understood from him that after making a tour through Europe and a visit to France, that he would return to California. In the

year 1851 he was a representative in the upper branch of the legislature of this State; that is the only office held by him in this State to my knowledge. He was afterwards a candidate before the democratic State convention, of which I was a member, for the nomination of governor. He did not receive the nomination, however; but my impression is, however, that we appointed him as a delegate from California to the World's Fair, or something of that kind, to be held somewhere in Europe.

Answer to int'y 4th. If he abandoned the State at all I knew nothing about it; as I stated in the foregoing answer, he left California with me on the steamship Winfield Scott, in the month of May or June, 1852, for the Atlantic States. My understanding from him was, after a visit to his family in Boston, and a tour through Europe, and a visit to France, he would return to California.

Answer to int'y 5th. He did not say how long he would be absent.

Answer to interrogatory 6th. He has not been in California that I know of since he left with me in 1852. If he ever abandoned his residence here I know nothing about it; and if he ever acquired a residence anywhere else, I have no knowledge of it. I have stated in my third answer all the facts I know relative to said defendant's residence in and departure from California.

Answers to Cross-interrogatories.

Answer to X-interrogatory 1st. I don't know of his abandonment of California; on the contrary, my impression was that he intended to return here.

Answer to X-interrogatory 2d. I don't know anything about his agent, if he had any.

Answer to X-interrogatory 3d. He never had his family in California that I know of. As to his permanent residence, all I know about it is, that he was State senator in California, and afterwards a candidate for nomination of governor before the democratic convention, and was elected by that convention as a delegate to represent California at the World's Fair, somewhere in Europe. He laid out the city of Oro, in Sutter county, of this State, and owned when he left here fifteen hundred acres of land in that county.

Answer to X-interrogatory 4th. He went to the Atlantic States. I don't know where he remained.

Answer to X-interrogatory 5th. I never knew his family; don't know when he came to this State; he left in June, 1852; don't know where he lived before he came here; my understanding was that he lived in Texas.

Answer to X-interrogatory 6th. My understanding is that he held the office of State senator, which expired before he left. He

was holding no office when he left that I know of, and no vacancy was created by his departure, to my knowledge.

Answer to X-interrogatory 7th. I never was convinced in my own mind that he would not return: on the contrary, I believe it was his intention to return.

W. S. LONG.

David F. Douglass, of Sacramento city, of lawful age, being first duly sworn, deposes and says as follows:

To the first interrogatory he answers. I don't know the plaintiff; am acquainted with the defendant, Gen'l Thomas Jefferson Green, of Mier Expedition notoriety.

Answer to interrogatory 2d. I don't know that I ever saw the defendant before November, 1849, at which time I became acquainted with him in the city of San Francisco, in this State, when we were on *on* way to the State capital, San José, California, where we served two sessions in the senate together, commencing Dec. 1st, 1849, and lasting until April or May, 1851; I think I saw him afterwards, in 1852, in Sacramento city, where and at which time he was a candidate for delegate to the national democratic convention; I have never seen him since. He was senator from what was known as the Sacramento district; he claimed his residence to be in Oro City, Sutter county, Cal.

Answer to interrogatory 3d. I don't know when his residence commenced or when it ceased; he always told me that he was a citizen of California; I don't know when he left, or what his future intentions were. He never made any declaration to me relative to his future residence. He did claim citizenship, and exercised all the rights and privileges of a citizen of this State. He held the office of State senator for 2 years. He did avail himself of the privileges of that office and discharged the duties pertaining to it. He also held the office of major general 1st division California militia, and discharged the duties thereof; fought battles, and made treaties with the Indians, according to his own reports, which I read in the newspapers of the day.

Answer to int'y 4th. I never heard of any abandonment of his residence here; his continued absence is the only abandonment I know or heard of; don't know when he left this State; never heard what his future intentions were.

Answer to interrogatory 5th. I never heard where he was going, or how long he would be absent. I was intimately acquainted with him, and in all his conversations with me on the subject of his residence, he claimed to be a citizen of California.

Answer to interrogatory 6th. I don't know that he has returned to California; I never was informed that he had acquired a residence anywhere else. I have stated all I know relative to the def't.

Answers to Cross-interrogatories.

Answer to cross-int. 1st. I knew nothing that induced me to believe that he would not return.

Answer to X-interrogatory 2d. I don't know that he left any agent here.

Answer to X-interrogatory 3d. I never saw his family, but I heard him say that they were at a place called Jamaica, near Boston; don't know that they were ever in California.

Answer to cross-interrogatory 4th. I dont know where he went from California, or where he remained.

Answer to interrogatory 5th. Don't know anything about it.

Answer to interrogatory 6th. He served his full term as State senator, or at least was present at the adjournment of the State legislature of 1851, which was on or about the first day of May, 1851. I often saw him—I think in Sacramento—in 1852. He was major general 1st division California militia, which office he held until the legislature of 1853 (of which I was a member) passed an act repealing the law under which he and myself held commissions of major general. I never heard of his resigning that office, or that there was a vacancy. I understood when I voted for the repeal of the law that he, as well as myself, both ceased to be major generals of the California militia.

Answer to cross-interrogatory 7th. Nothing but his continued absence from the State.

DAVID F. DOUGLASS.

P. H. Burnett, a resident of Sacramento city, of lawful age, being first duly sworn, deposes and says:

Answer to 1st interrogatory. I know Thomas J. Green.

Answer to 2d. I knew him in California first in the latter part of the summer of 1849, and from that time continuously until he left the State, which, I think, was in 1852.

Answer to interrogatory 3d. His residence here commenced in the latter part of the summer of 1849, and ended in 1852; I cannot state the exact period when he left; I heard no declaration from him as to his future residence. He claimed citizenship here and exercised the rights of a citizen. He was elected to the office of State senator for two years, and was also an officer in the California militia. He, to my certain knowledge, exercised the duties appertaining to each of said offices.

Answer to interrogatory 4th. I don't know of any publicity given to his abandonment of the State, and am not aware of any change of residence, except that he left the State. I did not hear him make any declaration in regard to his future residence or citizenship.

Answer to interrogatory 5th. I never heard him say where he was going, or how long he would be absent.

Answer to interrogatory 6th. He has never returned to California, that I know of; I don't know when it became generally known that he left the State; I never heard of his having acquired a fixed residence elsewhere; have stated all I know.

Answer to cross-interrogatory 1st. I knew nothing that induced me to believe that he would not return

Answer to X-interrogatory 2d. I do not know that he left an agent in California.

Answer to X-interrogatory 3d. He had no family here; I considered him a permanent resident of California when I knew him here.

Answer to interrogatory 4th. I do not know where he went, or remained, from California.

Answer to interrogatory 5th. I learned from him that he had resided in Texas, and his wife, I think, in Boston; he came to California in 1849, and I think left in 1852.

Answer to interrogatory 6th. He was elected on the 13th day of Nov., 1849, and held his office two years, and no vacancy was created by his departure from the State.

Answer to X-interrogatory 7th. I never had any opinion about it, and cannot answer the question.

PETER H. BURNETT.

David S. Terry, of lawful age, being first duly sworn, doth depose and say, viz:

Answer to interrogatory 1st. I know Thomas J. Green.

Answer to " 2d. I first knew him in Texas, in the summer of 1836, and met him frequently afterwards, during his residence in Texas, which, I think, continued till 1845. I met him in San Francisco, Cal., in Dec., 1849, at which time he was reputed to be a citizen of California.

Answer to interrogatory 3d. He was a member of the senate of California, from Sacramento district, and occupied his seat in that body during the first and second sessions of the legislature, which were held in 1850 and 1851; I do not know when his residence in California commenced, nor how long it continued. I do not remember when he left this State. It was after the adjournment of the legislature, which occurred on the 1st of May, 1851. I do not know what declarations he made on leaving, as to his future residence.

Answer to interrogatory 4th. I do not know when he abandoned his residence in California, or whether any publicity was ever given to the fact, nor do I remember hearing him make any declarations as to his future residence.

Answer to interrogatory 5th. I think to New York; heard him say nothing as to the probable length of his absence.

Answer to interrogatory 6th. He has not returned to California, to my knowledge; I do not know how long it was, after he left,

before it was generally known that he had abandoned his residence in California, nor do I remember receiving any information as to his place of residence since. I know of no other facts bearing on the question of residence, except that in July, 1851, General Green's name was before the Democratic State Convention as a candidate for governor.

Answer to cross-interrogatory 1st. I knew no fact relative to his departure, which induced me to think he would not return.

Answer to X-interrogatory 2d. I do not know.

Answer to X-interrogatory 3d. His family were never, to my knowledge, in California; as to permanent residence, I have stated all my knowledge on that point in my answer to the direct interrogatories.

Answer to X-interrogatory 4th. I do not know.

Answer to X-interrogatory 5th. I do not know.

Answer to X-interrogatory 6th. He held the office of State senator from the Sacramento district. The term of office was two years from the election which occurred in Nov., 1849. I do not think it was vacated by abandonment but two regular sessions of the legislature during his term. He served in both, and there was no extra session. I do not know how much of the term was unexpired when he left, as I do not know the date of his departure. There was no appointment or election to fill a vacancy caused by his leaving. His successor was elected at the general election in 1851. I cannot say, with certainty, who was his successor, as the Sacramento district had, since his election, been divided into several senatorial districts, and an appointment made, which very much increased its number of senators.

Answer to cross-interrogatory 7th. I do not know.

DAVID S. TERRY.

I, N. R. Wilson, notary public as aforesaid, do hereby certify, that the foregoing answers of W. S. Long, David F. Douglass, Peter H. Burnett and David S. Terry, were carefully read, corrected, sworn to, and subscribed before them, respectively, before me.

Given under my hand and seal of office, this 18th day of Nov., A. D. 1858.

[L. S.]

N. R. WILSON,
Notary Public, Sacramento County, California.

And on the 29th day of December, 1857, the following deposition of Addie B. Currier was filed for the def'ts, which *are* in words, to wit:

Filed 29th Dec., A. D. 1857. M. HOPKINS, *Clerk.*

Deposition of Addie B. Currier.

The deposition of Addie B. Currier, a witness for the defendant in the cause now pending, and at issue in the district court of the United States for the western district of Texas, held at the city of

Austin, between William Custard, plaintiff, and Thomas J. Green, defendant, taken at the Yarborough House, in the city of Raleigh, and State of North Carolina, on the 11th day of December, A. D. 1857, before me, James K. Marriott, a commissioner of the United States for the district of North Carolina to take bail, affidavits, &c., and to be read in evidence on the trial of said cause. The said deponent being by me first carefully examined and cautioned, and sworn to testify the whole truth, did depose and say as follows:

That she has been an inmate of the family of the said Thomas J. Green, the defendant in the above cause, since his marriage, in 1846, with his present wife. That said defendant made two trips to California, between the years of 1849 and 1852, and returned therefrom the last time on the 1st day of June, 1852, on which day he reached the city of New York. That which said time said Green has not been to California, he having kept house a portion of the time since his return at the homestead in Jamaica Plain, Massachusetts, and some time in Warren county, No. Carolina, spending his summers with his family generally in the mountains of Virginia, at the different watering places, at and near the White Sulphur Springs; generally residing at either of the above places during that time when not travelling. That within the last five years he has made frequent short trips to Texas, and that at no time was he ever absent long enough to go to California and return; and that during these absences, I was in constant correspondence with the defendant or some member of his family, as I did not accompany him to Texas. That at no time has she heard said defendant speak of returning to California, but, on the contrary, knows by frequent letters from Colonel John C. McLemore to said defendant, that he, McLemore, was the agent and attorney for winding up said defendant's business in that State. That since the defendant's return from California, he has, as far as she knows and believes, always registered his name, while travelling, "from Texas."

ADDIE B. CURRIER.

Sworn to and subscribed before me, the day and date above written.

J. K. MARRIOTT,
Commissioner U. S.

And I, the said J. K. Marriott, commissioner as aforesaid, do certify, that the foregoing deposition of Addie B. Currier was taken by me on the day and at the place named in the caption; that the said Addie B. Currier was by me first carefully cautioned, examined, and sworn to testify the whole truth, and did subscribe her testimony in my presence, after the same was rendered to writing, which was done by her in my presence. I further certify,

that the cause of taking the said deposition is, that the said defendant is now residing in North Carolina, at a greater distance than one hundred miles from Austin, Texas, the place of trial of said suit; and that no notification was given to the adverse party to attend and put interrogatories, because neither the said party, nor any attorney nor agent of his, lives or was within one hundred miles of the place of caption; and I further certify, that I am not of counsel or attorney of either of the parties, nor in anywise interested in the result of this cause.

J. K. MARRIOTT,
U. S. Commissioner.

UNITED STATES OF AMERICA,
District of North Carolina, Sixth Circuit Clerk's Office.

I hereby certify, that the above two are genuine signatures of Joseph K. Marriott, esquire, and that he was at the time of signing and affixing the same, and now is, a commissioner of the United States, in and for this district, duly appointed and commissioned and sworn.

Witness my hand and the seal of the court of the United States for the district of North Carolina, affixed at office, Raleigh, 12th Dec., 1857.

[SEAL.]

EDWARD CANTWELL, *C. C. U. S. M.*

Motion to quash Attachment.

And on the 11th day of Jan'y, 1858, (the def't) filed his motion to quash attachment, which is in words, to wit:

Filed Jan'y 11th, 1858.

M. HOPKINS, *Clerk.*

WM. CUSTARD
vs.
THOMAS J. GREEN.

And now, at this term, comes the defendant, by his attorneys, and moves to quash the writs of attachment heretofore issued in this cause, and the levies and seizures made by virtue thereof, and for greater particularity he refers to a writ of attachment on file in this cause issued to the sheriff of Harris county May 21, 1855; another on file, issued same date, to the sheriff of Bosque county.

And for grounds of his said motion, assigns the following reasons:

1st. The petition on which said writs were based presents no cause of action.

2d. The several amended petitions cannot relate back to the granting of said writs of attachment, and the same are not sworn to.

JNO. A. & R. GREEN,
Att'ys for Defendant.

And on the 13th day of Jan'y, 1858, the following proceedings were had in this cause, as appears upon the records of the minutes of this court, viz:

Amended Pleas of Plaintiff.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

And now comes the plaintiff, by attorney, and on leave of the court first had and obtained, filed his amended pleadings in this cause in words to wit:

Filed Jan'y 13th, 1858.

M. HOPKINS, *Clerk.*

In United States District Court, western district of Texas—Jan'y Term, 1858.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

And now comes the plaintiff, leave of the court first had and obtained, and amends his original and amended petitions heretofore filed, and for amendment and replication to the defendant's answer pleading the statute of limitations to the note described in the transcript of the record from the district court of Sutter county, in the State of California, upon which note said judgment was rendered, and the same note that is set out and declared upon in the plaintiff's amended petition filed on the 3d day of Dec., A. D. 1858.

And petitioner alleges that his cause of action upon said judgment and upon said note was not, at the date of the institution of this suit, and is not yet, barred by the statute of limitations of four years, or any other statute of limitations in force in the State of Texas or this court; and alleges, that on the 20th day of January, 1852, and on the 5th day of May, 1852, and again on the 24th day of January, 1853, at each and all of the dates above, did acknowledge the justice and validity of said note, and promised in writing, by letters written by him to the said Francis Arthur, of the above dates, to pay said note.

That the defendant did, on or about the 24th day of January, 1853, undertake and promise, in writing, to pay the note and mortgage described in the aforesaid transcript of the record from the district court of Sutter county, in the State of California; said promise in writing being made to the said Francis Arthur, and thanked him for his kindness in extending the time of payment, as per agreement made with the agent of the defendant. And plain-

tiff asks leave to introduce said letter and writing on the trial hereof as proof of the facts herein set forth and alleged.

By reason of all which, plaintiff alleges that the defendant is estopped and precluded from setting up or pleading the statute of limitations in this suit, that plaintiff's cause of action is not barred by limitations or lapse of time; wherefore he prays judgment as heretofore in his original and amended petitions.

HAMILTON & CHANDLER,
Att'ys for Plaintiff.

Exceptions to Depositions of A. B. Currier.

And afterwards, on the 4th day of January, '58, the plaintiff filed exception, &c., to deposition of Addie B. Currier, which exceptions are in words, viz:

Filed Jan'y , 1858.

M. HOPKINS, *Clerk.*

In the District Court of the United States for the western district of Texas.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

And now comes the said plaintiff, by his attorney, and excepts to the deposition of Addie B. Currier, taken de bene esse in this cause, before J. K. Marriott, commissioner, and moves to suppress the same, because—

1st. The said commissioner's certificate to the same shows no legal reason for the taking of such testimony.

2d. Because it does not appear that the deposition was retained by the said commissioner until he deposited the same in the post office; and because it does not appear that the said deposition was sealed up by the commissioner.

3d. Because the same are in other respects informal.

HAMILTON & CHANDLER,
Att'ys for Plaintiff.

Demurrer and amended Answer.

And afterwards, to wit, on the 22d Jan'y, '58, defendant filed his demurrer and amended answer, which is in words to wit, and endorsed—

Filed Jan'y 22d, 1858.

M. HOPKINS, *Clerk.*

January Term, U. S. D. C., 1858.

WM. CUSTARD
vs.
THOMAS J. GREEN.

And now, at this term, comes the defendant and demurs to the several amended petitions of the plaintiff filed since the last amended answer of this defendant, and says the same are insufficient in law to authorize any recovery against this defendant; and for special cause of demurrer to the amended petition filed Jan'y 13, 1858, he says that the cause of action therein set forth is a new and distinct cause of action, and that the same accrued to said plaintiff or those through whom he claims, if it ever accrued, more than four years before the commencement of the suit thereupon by the filing of said amendments, wherefore he prays said bill and the other various amendments be dismissed at plaintiff's cost.

And for answer to said amendment this defendant denies all and singular the allegations therein contained.

And further answering, he says, that the cause of action set forth in said amendment filed July 13, 1858, accrued, if at all, more than four years before the filing of said amendment; wherefore the said plaintiff is barred and precluded from having or maintaining his said action against him; wherefore he prays judgment, and that said action be dismissed with costs.

JOHN A. & R. GREEN,
Def't's Att'ys.

Order of Continuance, &c.

And on the 28th Jan'y, 1858, the following proceedings had in this cause appear from the records of the minutes of this court:

WILLIAM CUSTARD
vs. } No. 171.
THOMAS J. GREEN.

Now, on this day comes the parties, by their attorneys, and the same having been set for trial on this day, and counsel not being ready, for reasons assigned, it was ordered that this case be continued, with leave to either party to open the continuance, during the present term.

Continuance set aside and Order.

And on the 4th February, 1858, the following proceedings had in this cause appear upon the records of the minutes of this court, (page 334,) in words to wit:

WILLIAM CUSTARD
vs. } No. 171.
THOMAS J. GREEN.

Now on this day come the parties, by their attorneys, and, on motion, it was ordered that the continuance heretofore entered be set aside, and that both parties have leave to amend; whereupon, the arguments proceeded on the demurrers filed in this cause.

Defendant's Demurrer.

And on the same day def't filed his demurrer, which is in words to wit, and endorsed in words, to wit:

Filed February 4th, 1858.

M. HOPKINS, *Clerk.*

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

The defendant assigns as special cause of demurrer that it is not averred in the amended petitions that the promissory note was endorsed to plaintiff so as to make him the legal holder thereof, and it is not averred that the plaintiff is the legal endorsee, or assignee in any manner which is known to the law, so as to make him the legal owner thereof.

And for special demurrer to the original petition, and to all the amendments, he says that there is not sufficient averment of the legal ownership of the judgment or note in the plaintiff's judgment or note.

2d. But it is affirmatively shown that the legal property was and is in Francis Arthur.

3d. There is no averment of such legal service as gave the court jurisdiction over this defendant, so as to render a judgment against him personally.

4th. It appears from the record declared on, that the suit in California was a proceeding in rem, and not against this defendant in personam.

5th. It is not averred that the plaintiff has not derived whatever title he has from a citizen of Texas.

6th. There is no averment of service upon this defendant.

7th. It affirmatively appears that the note declared on was and is for a fraudulent, corrupt, and usurious consideration.

8th. It affirmatively appears that the note was barred by the statute of limitations, and the replications in avoidance of the four years' plea are insufficient in law, in that they set out no contained in the statutes of Texas.

9th. The new promises declared on are affirmatively shown to have been made to Francis Arthur, and in such promises the plaintiff has no legal title.

10th. The causes of action declared on are contradictory, and cannot be joined, the one being averred to be a debt of record which cannot be assigned, the other a promissory note, which is averred to be merged in the debt of record.

And for special causes of demurrer this defendant prays that this suit be dismissed.

JOHN A. & R. GREEN,
Att'ys for Def't.

Amended Plea of Pl'ff.

And on the 5th day of February, 1856, the pl'ff (by leave of court) filed his amendment, which is in words, to wit:

Endorsed: Filed Feb. 5th, 1856.

M. HOPKINS, *Clerk*.

United States District Court—January Term, 1858.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

The plaintiff, by his attorney, after leave of the court, files the amendment following to his original and amended petitions heretofore filed in this cause:

1st. That he was at the date of the filing of this suit the owner, holder, and legally the possessor of the judgment declared upon in the original petition, as also the legal and rightful owner of the said promissory note, set out in amended petition, filed 3d day of Dec., 1856, a copy of which said note was contained in the record of the said judgment originally declared on in instituting this suit; that said note and said judgment were duly and legally transferred and assigned to him, plaintiff, in the course of trade, and for a valuable consideration.

2d. That Francis Arthur, the assignor of plaintiff, was at the date of the said promissory note, at the date of the institution of the suit thereon, at the date of the rendition of the judgment, at the date of the assignment of said judgment and note, and at the date of the institution of this suit, a resident citizen of the State of California.

3d. That the rate of interest*ed* stipulated in said note is the rate of interest by the statute laws of California, when the contract therefore is set forth in writing; that the consideration of said note is neither fraudulent, corrupt, nor usurious.

4th. That the defendant is estopped and precluded from pleading the statute of limitations to the said judgment, or to the said note, in bar of recovery thereon, because he says that the said defendant did on the 20th day of January, 1852, and on the fifth day of May, 1852, and again on the 24th day of Jan'y, 1853, at each and every of the above dates, acknowledge*d* the justice and validity of said note, and promised in writing by letters written by him, the said defendant, with his own proper name, to the said Francis Arthur, to pay said note.

That said defendant did, on or about the 24th day of January, 1853, undertake and promise*d*, in writing, signed by the said defendant, to pay the said note and mortgage set out and described in the transcript of the record from the district court of Sutter county, in the State of California, said promises in writing, signed

by the said defendant, being made to the said Francis Arthur, all benefit and advantages of said writings and promises, signed by the said defendant on the trial hereof, as proof of the facts as herein set forth and alleged.

For all which reasons, allegations and averments, in connection with other allegations and averments heretofore made, plaintiff asks judgment, as prayed for in original and amended petitions.

HAMILTON & CHANDLER, *Pl'ff's Attorneys.*

Exhibits to Depositions, and Depositions.

And on the 12th day of April, 1858, the following depositions (taken by W. B. Webb, U. S. commissioner) of John C. McLemore, in behalf of the defendant in this cause, *was* filed, and are in words, to wit:

To which depositions were attached the following exhibits.

M. HOPKINS, *Clerk.*

(A.)

SAN FRANCISCO, 16*th April*, 1853.

General THOMAS J. GREEN:

DEAR KINSMAN: This will be handed to you by your old companion in arms, Mr. F. Arthur, who sails this evening on the Brother Jonathan for Boston. He informs me that his lawyers tell him that they will get a decree and order of sale upon the mortgage you gave him on Oro some time in July, and that the sale will take place in August; that the principal and interest up to July will amount to about $8,500, and he has promised me to have bid at the sale the full amount of principal and interest, and says, that if any one will bid $5,000 over that amount, they can have the land. I have advised him to hold on to it, to see whether the great Pacific Railroad will not pass directly through it, when no doubt it will command $50 per acre; if so, he can afford to pay you something more than you have got, for I see no hope of being able to redeem the land, unless you send the money for that purpose. Mr. Arthur has been liberal in his indulgences, and would not foreclose the mortgage if he was situated as formerly. He has another mortgage, which he has not foreclosed, because it would distress the families living on the land, which leaves him with only a few hundred dollars to pay current expenses, not exceeding with him $1,200. He is indeed a kind, good man, and disposed to do anything in his power to serve you. If he gets a good price, will pay you something over.

Present me kindly to cousin Adeline, Mrs. Goff, Esther, and also to Miss Hartland when you see her.

Very truly, your friend,

JOHN C. McLEMORE.

(B.)

ORO CITY, PLACER CO., *Oct.* 1*st*, 1855.

THOMAS J. GREEN:

DEAR SIR: The Sutter claim, as your are aware, was confirmed by the commissioners the 15th of last May. Your mortgage to me I was obliged to foreclose in the summer of '53, in order to save myself. The uncertainty of the claim ever being confirmed, rendered the sheriff unable to get an offer except from myself; I bid it in for one thousand dollars, and received judgment for the balance, some 10 or 11 thousand dollars. Last fall it was so firmly the opinion of the public that Sutter would lose his land, that Barham and the other squatters commenced improving; they have now 300 acres under an excellent post and rail fence; they wish to buy it, but I will not sell in small parcels, and traffic in notes, &c. In a former letter you said you wished me not to distress you by foreclosure, and that if I would wait till it was confirmed, you could afford to pay me the interest; I did not choose to do so. Land titles were then uncertain, so I foreclosed, as a mortgage on a rejected claim would be worthless. Affairs have changed. Now, I will act fairly; if you want Oro you can have it for what it has cost. of affairs connected with Texas matters, some 18 thousand dollars, from which outlay I have as yet received not one cent income. I would like to know your views by return mail.

I am, respectfully, y'rs,
F. A. ARTHUR.

Affidavit of Defendant.

Circuit Court of the United States for the western district of Texas.

DISTRICT OF COLUMBIA, *to wit:*

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

Thomas J. Green, of , Massachusetts, being sworn, saith, that he is the defendant in the above entitled cause; that the court at which he expects the said cause to be tried holds its sittings at Austin, in the State of Texas; that he is advised and verily believes that the testimony of John C. McLemore is material and necessary for his defence in said cause; that the said John C. McLemore resides in the city of San Francisco, in the State of California, more than one thousand miles from the place where the said court is to be held; that the said McLemore is now in the city of Washington, in the District of Columbia, whence he is about to go to a distant part of the country; that he will not be able to get his testimony before the time appointed for the trial of said cause, unless he

takes it at this time; that the said William Custard resides at Austin, Texas, more than one hundred miles from Washington city, the place where it is proposed to examine the said witness, and he has no counsel, as deponent is informed and believes, within one hundred miles of the said city of Washington.

THOMAS J. GREEN.

Sworn to and subscribed before me this 30th day of March, 1858.

W. B. WEBB, *U. S. Com'r.*

United States Circuit Court for the western district of Texas.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

DISTRICT OF COLUMBIA,
City of Washington.

Let John C. McLemore, the witness named in the above affidavit, be examined before me de bene esse accordingly, at my office in the city of Washington, at 12 m., on the 31st March, 1858.

W. B. WEBB,
U. S. Commissioner.

Be it remembered, that on the 30th day of March, 1858, at the city of Washington, in the District of Columbia, application was made to me, William B. Webb, a commissioner appointed by the circuit court of the District of Columbia, under and by virtue of the acts of Congress passed February 20th, 1812, and March 1st, 1857, to take affidavits and bail in civil cases depending in the courts of the United States, and depositions de bene esse upon the affidavit of Thomas J. Green, which is hereto annexed, stating that he, the said Thomas J. Green, was defendant in a civil suit then pending in the circuit court of the United States for the western district of Texas, wherein William Custard was plaintiff; that the testimony of John C. McLemore was material and necessary for him, the said defendant, in his defence of said suit; that the said McLemore resided in San Francisco, in the State of California, more than one hundred miles from the city of Austin, in the State of Texas, the place where the court was held, at which the said defendant expected the said suit would be tried; that the said McLemore was then in the city of Washington, whence he was to go to a distant part of the country, and that unless he could take the testimony of the said McLemore at that time, he would not be able to take it at any time before the time appointed for the trial of the said suit. And I was requested by the said Thomas J. Green that the said John C. McLemore might be examined according to the act of Congress in such cases made and provided. Whereupon I made an order, which is hereunto annexed, that the

said McLemore should be examined de bene esse before me at my office in the city of Washington; and having been informed by the said affidavit of the said Thomas J. Green, that the said William Custard, the plaintiff, resided more than one hundred miles from the city of Washington aforesaid, and that he, the said plaintiff, had no counsel within one hundred miles of said city, I have accordingly proceeded with the examination.

Deposition.

John C. McLemore, a witness produced on the part of the defendant, having been first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, deposes and says as follows in reply to interrogatories:

1st question. What is your age, and where do you reside, and how long will you remain here?

Answer. I am sixty-eight years of age, and reside in San Francisco, California. I am here temporarily on business, but I am under the necessity of travelling to Memphis, Tennessee, and again back to Washington and New York. When I return I expect to sail for California at an early day. My movements, from the nature of my business, must be very uncertain. I shall leave this city in a few days.

2d question. Do you know the defendant in the above case, and how long have you known him? Is there any relationship between you and him?

Answer. I have known the defendant, Thomas J. Green, forty years, a considerable portion of that time intimately, and have had various transactions with him, social and monetary, and always pleasant, honorable, and satisfactory on his part. I first knew him in his native county, Marion, North Carolina, and subsequently several years in Nashville, Tennessee, when I was surveyor general of the military district. I have been much with him since; the last time previous to this year was in part of the years 1851 and 1852, in the State of California. Gen. Green is my second cousin.

3d question. Are you acquainted with Francis Arthur, of the State of California; and if so, do you know anything, and what, about said Green having mortgaged to said Arthur a certain tract of land on Bear river, or creek, (as it is sometimes called,) which said tract of land was and is known as the town tract of Oro?

Answer. I am well acquainted with Francis Arthur, of California. I knew of the mortgage, for I was present when the negotiations were made between Green and the said Arthur. Afterwards I was somewhat connected with the transaction, from the fact that General Green on leaving California gave me an unlimited power of attorney, which is yet unrevoked, to settle all his business in that State. *I* became necessary for me to have fre-

quent interviews with the said Arthur in reference to the said mortgage.

4th question. At what time did Green leave California; has he been back there, and when?

Answer. Gen. Thomas J. Green left California some time early in the year 1852; he has not been in that State since. I have been constantly there until my present visit to the Atlantic States, and was all the time acting as his agent.

5th question. Did or did not General Green abandon his residence in California at the time he left in 1852?

Answer. That was my understanding. He had a family near Boston, and he gave me authority, full and unlimited, to settle all his business. I never expected him to return.

6th question. Do you know where has been the residence of Gen. Green, the defendant, since he left California?

Answer. His family residence is at Jamaica Plain, near Boston, in Massachusetts; most of his letters to me were dated from that place; I have been at his house there; his wife has also written me about his business from that place; his habit is to travel much in the summer on account of the ill health of his daughter, hence I received letters dated at other places.

7th question. Look at the letter herewith shown you, dated San Francisco, 16th April, 1853, addressed to Gen. Green, purporting to be signed by you, which letter is marked (A), and state whether it is your handwriting, and whether or not its contents were known to Francis Arthur.

Answer. The said letter is in my handwriting, and was by me delivered to said Arthur, after having read it to him. Mr. Arthur was fully advised of the contents of the letter, and I think it was not sealed when I gave it to him; he stated that he would see General Green before he (left) returned to California, he being then about to visit New England, where he said he was born. I another very lengthy letter written by me to Gen. Green upon this and other matters, dated San Francisco, 30th May, 1853, which is now before me, and which was sent by mail. I advised Gen. Green that he would see Arthur, in the following words:

You will have seen Arthur before this reaches you; I have kept you advised by nearly every mail about Oro. He will sell it under the mortgage, in July, but think, when he sees you, that you can secure something more from him than the amount he advanced you. I kept him off as long as he would wait. Oro is not saleable; the overflow injured it much; still it is very valuable, and if the title was confirmed, it ought to sell for $15,000 or $20,000. As it is situated I can do nothing for you.

This is all the letter contains on that subject, and I quote this passage to show its reference to the subject of the former letter.

8th question. Are the facts stated in the two letters above quoted true, and were the letters written at the time they bear date?

Answer. The facts stated in said letters were all true, according to my belief. Green's title to said land has since been confirmed, as it was a part of the large Sutter grant; the letters were written at the time they bear date.

9th question. Are you not acquainted with the said Arthur's handwriting?

Answer. I have corresponded with him and have *and have* seen him write; I think I would know his handwriting.

10th question. Look at the letter marked B, dated Oro city, Placer Co., Oct. 11, 1855, addressed to Thomas J. Green, and purporting to be signed by F. Arthur, and state whether or not the signature is in the handwriting of the said Francis Arthur?

Answer. I believe it is.

JNO. C. McLEMORE.

Sworn to and subscribed before me, this 31st day of March, 1858.

W. B. WEBB,
U. S. Commissioner.

And I do further certify that the preceding deposition was wholly reduced to writing by me, and was afterwards subscribed by the said John C. McLemore in my presence; that the reason for taking said depositions was, that the said witness resided more than one hundred miles from the place where the court before which the aforesaid cause was to be tried was, by said appointment, to be held, and was about to go to another and distant part of the country; that no notice of the said examination was served upon the opposite party or his counsel, because neither of them resided within one hundred miles of the place of said examination. And I do further certify, that I am not counsel or attorney for either of the said parties to the said suit, nor am I interested in the result thereof.

Witness my hand and seal, this 31st March, 1858.

[L. S.]

W. B. WEBB,
U. S. Commissioner.

Entry.

And on the 5th day of June, 1858, the following proceeding had in this case appears upon the record of the minutes of this court, in words, to wit:

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

Now, on this day come the parties, by their attorneys, and the court was occupied until near the hour of adjournment in hearing

the arguments on the demurrers filed in this cause. The argument was closed and the same taken under consideration.

Plaintiff's Exceptions.

And on the 10th June, 1858, the plaintiff filed exceptions, which are in words, to wit:

Endorsed: Filed June 10th, 1858.

M. HOPKINS, *Clerk.*

In the District Court of the United States for the western district of Texas, sitting at Austin—June Term, 1858.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

And now comes the plaintiff, by his attorneys, and excepts to so much of the defendant's answer as alleges, in substance, that Francis Arthur is the equitable owner of the debt sued in this action, because he says it constitutes no defence to the plaintiff's suit on the law side of this court: wherefore, plaintiff asks that so much of said plea or answer be stricken out.

HAMILTON & CHANDLER,
Att'ys for Plaintiff.

Entry.

And on the 25th day of June, 1858, the following proceedings had in this case appear upon the records of the minutes of this court, in words to wit:

WILLIAM CUSTARD
vs. 171.
THOMAS J. GREEN.

Now, on this day come the parties, by their attorneys, and having waived a jury, the argument proceeded and was submitted upon the questions raised, the pleadings and proof, and the court has the same under consideration.

Order and Judgment.

And on the 27th day of June, 1858, the following proceeding had in this case appears upon the records of the minutes of this court, in words to wit:

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

Now, on this day come the parties, by their attorneys, and the court being now sufficienty advised upon the questions submitted, is of the opinion that the judgment, the original cause of action in this case, is not conclusive, and in fact a nullity; but because the

parties plaintiff have amended their petition herein by setting forth the note, the base of the said judgment, and it has become a part of the pleadings in this cause, and the court being of opinion that upon the note the court is debarred from entertaining the case further for want of jurisdiction, it is therefore considered by the court that the case ought to be remanded. It is therefore ordered that this case, with all the papers belonging to the same, be and is hereby remanded to the district court of McLennan county for further action, and the question of costs being one which should have some action from this court, the same is held for consideration.

Order as to Costs.

And afterwards, to wit, on the 2d July, 1858, the following proceedings were had in this case, as appears upon the record of the minutes of this court, (page 437,) in words, to wit:

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

And now on this day come the parties, by their attorneys, and the court is of the opinion that each party pay their own cost by them incurred in this court.

Plaintiff's Bill of Exceptions.

And on the third day of July, 1858, the plaintiff filed his bill of exceptions to the rulings of the court in this case, which said bill is in words, to wit:

Endorsed: Filed 3d July, 1858.

M. HOPKINS, *Clerk.*

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

Be it remembered, that at the June term, A. D. 1858, on the 28th day of June, appeared the parties, plaintiff and defendant, by their attorneys, and the plaintiff submitted to the court their exceptions and general demurrers, the first of which was filed on the 16th day of June, 1857.

U. S. Dist. Court west. dist. of Texas—June Term, 1858.

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

And now comes the defendant, by his attorney, and by way of exception and replication to defendant's amended answer and plea filed herein on the day of June, 1857, *and* says that he excepts to so much of said answer as avers that one Francis Arthur

is still the real party in interest in said claim against the defendant, and so was at the commencement of this suit, and says that said allegation is *irrevalent*, impertinent, and immaterial, and that said plaintiff ought not to be required to answer the same; wherefore he prays judgment of the court whether the same should not be stricken from said answer.

A. J. HAMILTON,
for Pl'ff.

And the exceptions and demurrer filed by the plaintiff to defendant's answer on the 10th of June, 1858, which is in words and figures as follows, to wit:

In the District Court of the United States for the western district of Texas, sitting at Austin—June Term, A. D. 1858.

WM. CUSTARD
vs.
THOMAS J. GREEN.

And now comes the plaintiff, by his attorney, and excepts to so much of the defendant's answer as alleges, in substance, that Francis Arthur is the equitable owner of the debt sued for in this action, because he says it constitutes no defence to the plaintiff's suit on the law side of this court; wherefore, plaintiff asks that so much of said plea or answer be stricken out.

HAMILTON & CHANDLER,
Att'ys for the Pl'ff.

And the defendant, by his attorneys, submitted to the court the following general and special demurrers or exceptions to the plaintiff's original and amended petitions, to wit, the demurrer filed 27th Nov. 1856, which is as follows:

CUSTARD
vs.
GREEN.

And now comes the defendant in the above entitled cause, and demurs to the plaintiff's petition in the above entitled cause, and says that the matters and things therein alleged are insufficient in law to entitle said plaintiff to any relief; wherefore he prays judgment.

J. A. & R. GREEN,
Def't's Att'ys.

And for amended answer the defendants say, that the judgment alleged by said plaintiff to have been obtained against him in the State of California, if obtained at all, was so obtained without any personal notice to this defendant, who was not then a resident of the State of California, and that he never appeared and answered

to any of the proceedings in said judgment, but that the same is utterly void; wherefore he prays judgment, &c.

JOHN A. & R. GREEN,
Atty's for Deft.

And the following exception on the 16th June, 1857:

U. S. Dist. Court—June Term, 1857.

WM. CUSTARD
vs.
THOMAS J. GREEN.

And now, at this term, comes the defendant, and demurs *and demurs* to the several amended petitions, as well as the original petition filed in the said cause, and says that the same are insufficient in law to authorize any judgment against this defendant; and for special cause of exception to the amended petition of pl'ff filed Dec. 3d, 1856, he says that the same embodies a new and substantive cause of action from that embraced in the original and previous amended petition; and for further cause, he says that the cause of action, if any, on said promissory note accrued more than four years before the said amended petition, in which it is declared on, was filed, as appears from said amended petition.

Wherefore defendant prays judgment against said plaintiff that he pay all costs of suit, &c., and the following motion to quash the attachment, filed Jan'y 11th, 1858:

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

And now, at this term, comes the defendant, by his attorneys, and moves to quash the writs of attachment heretofore issued in this cause, and the levies and seizures made by virtue thereof, and for greater particularity he refers to a writ of attachment on file in this cause issued to the sheriff of Harris county, May 21st, 1855, another on file issued same day to the sheriff of Bosque county; and for grounds of his said motion assigns the following reasons:

1st. The petition on which said writs were based presents no cause of action.

2d. The several amended petitions cannot relate back to the granting of said writs of attachment, and the same are not sworn to.

J. A. & R. GREEN,
Atty's for Def't.

And the following exceptions, filed Jan'y 22d, 1858:

January Term U. S. D. C., 1858.

WM. CUSTARD
vs.
THOMAS J. GREEN.

And now, at this term, comes the defendant, and demurs to the several amended petitions of the plaintiff since the last amended answer of this defendant, and says the same are insufficient in law to authorize any recovery against this defendant, and for special cause of demurrer to the amended petition filed Jan'y 13th, 1855, he says that the cause of action therein set forth is a new and distinct cause of action, and that the same accrued to said plaintiff, or those through whom he claims (if it ever accrued,) more than four years before the commencement of suit thereupon by the filing of said amendment; wherefore he prays said bill, and the various amendments be dismissed at plaintiff's cost.

And the following exceptions, filed on the 4th of Feb'y, 1858:

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

The defendant assigns, as special cause of demurrer, that it is not averred in the amended petitions that the promissory note was endorsed to the plaintiff so as to make him the legal holder thereof; and it is not averred that the plaintiff is the legal endorsee or assignee in any manner known to the law so as to make him the legal owner thereof.

And for special demurrer to the original petition and all the amendments, he says that there is no sufficient averments of the legal ownership of the judgment or note in the plaintiff's judgment or note.

2d. But it is affirmatively shown that the legal property was and is in Francis Arthur.

3d. There is no averment of such legal service as gave the court jurisdiction over this defendant, so as to render a judgment against him personally.

4th. It appears from the record declared on, that the suit in California was a proceeding in rem, and not against this defendant in personam.

5th. It is not averred that the plaintiff has not derived whatever title he has from a citizen of Texas.

6th. There is no averment of service upon this defendant.

7th. It affirmatively appears that the note declared on was *was*, and is, for a fraudulent, corrupt, and usurious consideration.

8th. It affirmatively appears that the note was barred by the statute of limitations, and the replications in avoidance of the four years' plea are insufficient in law, in that they set out no saving contained in the statute of Texas.

9th. The new promises declared on are affirmatively shown to have been made to Francis Arthur, and in such promises the plaintiff has no legal title.

10th. The causes of action declared on are contradictory, and cannot be joined; the one averred to be a debt of record which cannot be assigned; the other a promissory note, which is averred to be merged in that debt of record, and for these special causes and demurrers the defendant prays that said suit be dismissed.

JOHN A. & R. GREEN,
For Defendants.

It was agreed by the court and the parties that the court should consider of and pass upon the demurrers and exceptions of the plaintiff and the defendant at the same time; wherefore the court rendered the following judgment, to wit:

WILLIAM CUSTARD
vs.
THOMAS J. GREEN.

And now on this day came the parties, by their attorneys, and the court being now sufficiently advised upon the questions submitted, is of opinion that the judgment, the original cause of action in this case, is not conclusive, in fact is a nullity; but because the parties plaintiff have amended their petition herein, setting forth the note the base of said judgment, and as it has become a part of the pleadings in this case, and the court being of the opinion that upon the note the court is debarred from entertaining the case further in this court for want of jurisdiction, it is therefore considered by the court that the cause ought to be remanded. It is therefore ordered and decreed that this case, with all the papers belonging to the same, be and is hereby remanded to the district court of McLennan county for further action; to all which orders, judgments, and rulings upon said plaintiff's and defendant's demurrer and exceptions the plaintiff, by his attorney, excepts and tenders his bill of exceptions, and the court signs and seals the same, and makes them a part of the final record in this cause.

THO. H. DUVAL, [SEAL.]
U. S. Dis't Judge.

Defendant's Bill of Exceptions.

And on the 3d day of July, 1858, the defendant filed his bill of exceptions, which is in words, to wit:

Filed July 1st, 1858.

M. HOPKINS,
Clerk.

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U. S. D. Court—June Term, 1858.

WM. CUSTARD
vs.
THOMAS J. GREEN.

Be it remembered, that the above entitled cause having been called for trial at said term, the defendant, by his attorneys, asks that the demurrer and exceptions to the petition, and various amended petitions, of the plaintiff, should be taken up, and that the said suit should be dismissed. Said defendant asked that the said petition and amended petitions should be dismissed on the following grounds, as well as the other grounds taken in said demurrer and special exceptions:

1st. That the judgment sued on in the original petition was a nullity, because obtained without notice to the defendant, as appeared from a certified copy thereof appended to original petition.

2d. That the amendments filed after the cause was removed from the State court to the United States court, setting up the note upon which judgment was obtained, could not be taken cognizance of by this court for want of jurisdiction; because the plaintiff, Custard, could not, as assignee of a promissory note, give the court jurisdiction of a suit for its contents unless the payee could have recovered the same; and because, as between the payee and maker of said note, this court could not entertain jurisdiction, because neither of them are citizens of the State of Texas.

Upon which exceptions the court ruled as follows:

1st. That the judgment upon which the suit was brought in the original petition was a nullity.

2d. That the cause was properly removed from the State court to the United States court, this court having jurisdiction over the suit as originally brought, and as it stood when removed into this court.

3d. That the cause of action set up by the amended petition of plaintiff, filed after the removal of the cause to the United States court, has no jurisdiction for the reason assigned by the defendant.

Upon which the court remanded the cause to the State court, and so entered judgment; to which ruling of the court the defendant, by his attorney, excepted, and asked that the said cause should be dismissed and not remanded, which exception was overruled by the court; wherefore the defendant tenders this his bill of exceptions, which is signed and sealed by the court, and ordered to be made a part of the final record of the cause.

THO. H. DUVAL, [SEAL.]
U. S. Dist. Judge.

And afterwards, to wit, on the first day of September, A. D.

1858, the defendant, by his attorney, J. A. and R. Green, filed his bond for writ of error, endorsed as follows:

WM. CUSTARD
vs. } L. 171.
THOMAS J. GREEN.

Bond for writ of error. Filed Sept. 1st, 1858.

MATTHEW HOPKINS, *Clerk.*

And in words, to wit:

Bond for Writ of Error.

District Court of the United States, western district of Texas.

WM. CUSTARD
vs.
THOMAS J. GREEN.

Know all men by these presents, that we, Thomas J. Green, as principal, and , as sureties, are held and firmly bound unto the above named William Custard in the sum of two hundred dollars *dollars,* to be paid by the said obligees, their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this 31st of August, A. D. 1858.

The condition of the above obligation is such, that whereas the above obligee has recovered a judgment in the district court of the United States for the western district of Texas, at Austin sitting, having circuit court powers, against the said Thomas J. Green for dollars costs, and remanding the above entitled cause to the State court from whence it had been removed, which judgments were rendered on the day of and day of , 1858:

And whereas the said Thomas J. Green, in order to obtain a reversal of the same, has sued out a writ of error to the Supreme Court of the United States:

Now, therefore, if the above named Thomas J. Green shall prosecute his said writ of error with effect, and shall answer all damages and costs, and shall abide by and perform said judgment if he fail to make good his plea, then this obligation shall be void, otherwise in full force and effect.

Executed and delivered in presence of—

THOMAS J. GREEN, [SEAL.]
By his Attorneys in fact, JOHN A. & R. GREEN.
W. J. GREEN, [SEAL.]
By Attorneys in fact, JNO. A. & R. GREEN.
JNO. A. GREEN, [SEAL.]
ROBERT GREEN. [SEAL.]

The above examined and approved.

THOMAS H. DUVAL,
U. S. Dist. Judge.

Copy of Writ of Error.

And on the same day was filed a writ of error and copy of writ of error duly allowed by the Hon. Thomas H. Duval, judge, and sealed by the clerk, endorsed, to wit, the copy of which is in words, to wit:

WM. CUSTARD
vs. } L. 171.
THOMAS J. GREEN.

Copy of writ of error. Filed Sept. 1st, 1858.

MATTHEW HOPKINS, *Clerk.*

And in words as follows:

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the judge of the district court of the United States for the western district of Texas, having circuit powers, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between William Custard, plaintiff, and Thomas J. Green, defendant, in a plea of debt, at Austin, by removal *for* the district court of the State of Texas, a manifest error has intervened, to the great damage of said Thomas J. Green, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in this manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that if judgment thereof be given, then, under your seal, you do openly and distinctly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and associate justices of the Supreme Court of the United States, on the first Monday in December next, at Washington, being the present seat of the national government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court, at Washington aforesaid, this the 31st of August, in the year of our Lord one thousand eight hundred and fifty-eight, of the independence of the United States the eighty-third.

[SEAL.]

THOMAS H. DUVAL,
Dist. Judge U. States, West. Dist. Texas.

Witness Matthew Hopkins, clerk, and seal of court, at Austin, this Sept. 1, 1858.

[L. S.] MATTHEW HOPKINS, *Clerk.*

Citation in Error.

And at the same time the defendant, by his attorneys, filed the citation in error, signed by the judge and sealed by the clerk, endorsed to wit:

WM. CUSTARD
vs. } L. 171.
THOMAS J. GREEN.

Citation in error. Filed Sept. 1st, 1858.

MATTHEW HOPKINS, *Clerk.*

And in words as follows:

UNITED STATES OF AMERICA, *ss.*

The President of the United States to William Custard, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the western district of Texas, at Austin sitting, having circuit court powers, wherein Thomas J. Green is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas H. Duval, judge of the district court of the United States for the western district of Texas, at Austin, having circuit court powers, this the 31st Aug., in the year of our Lord one thousand eight hundred and fifty-eight.

THOS. H. DUVAL,
U. S. Dist. Judge.

In testimony whereof we have hereunto set our hand and seal of court this first day of September, 1858.

MATTHEW HOPKINS, *Clerk.*

[SEAL.]

Affidavit of Service.

Upon the citation in error appears the following endorsement of affidavit of service:

UNITED STATES OF AMERICA.

District Court of the United States for the western district of Texas, holding sessions at Austin.

CLERK'S OFFICE, *Sept. 13th*, 1858.

Before me, Matthew Hopkins, clerk of the district court of the United States for the western district of Texas, at Austin, and ex officio U. S. commissioner, personally appeared Chas. Coney, United States deputy marshal, who being duly sworn, doth depose and say that he delivered to William Custard, defendant in error, a true copy of the original citation in error in the case of Wm. Custard vs. Thos. J. Green, in the U. S. court at Austin, at Austin, the day and year above written.

CHAS. CONEY,
Deputy U. S. M. A. D. T.

Sworn to and subscribed before me this 27th day of September, A. D. 1858.

MATTHEW HOPKINS,
U. S. Commissioner.

DISTRICT COURT OF THE UNITED STATES,
Western District of Texas, at Austin, ss.

I, Matthew Hopkins, clerk of the district court of the United States for the western district of Texas, at Austin, certify *that* the foregoing one hundred and two pages to be a true and perfect transcript of the record and all the proceedings had in case L. No. 171, wherein William Custard is plaintiff, and Thomas J. Green defendant.

In testimony whereof, I hereunto set my hand and affix the seal of the court. Done at the city of Austin, this twenty-seventh day of September, A. D. 1858, eighteen hundred and fifty-eight, and of the independence of the United States the eighty-third year.

[SEAL.]

MATTHEW HOPKINS, *Clerk.*

Memorandum by the Clerk.

The attorney of the plaintiff in this cause, the defendant in error, requires that I should state certain facts in relation to the record. On the final disposition of the cause, the plaintiff and defendant having both filed their bills of exceptions, a full record was made of all the papers appertaining to it, and of all the orders in the case. After the papers had been sent back to the State court, in pursuance of the order transferring it from this court to the State court from whence it originally came, the writ of error was lodged, and this transcript made from the record in office.

M. HOPKINS, *Clerk.*

Filed 18 Nov., 1858.